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III a

QUESTIONS & ANSWERS

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Principles of British Constitution

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SUPERIOR

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Principles of British Constitution

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Principles of British Constitution

CHAPTER 1

INTRODUCTORY

Q. 1. Explain the following terms:

(1) State; (2) Government;

(3) Constitution; (4) Constitutional Law.

Ans. (1) State : The State has been variously defined by different authorities from different points of view. It may shortly be described as an independent political society, occupying a definite territory, and having for its primary object, --- the defence of the territory against external aggression and the maintenance of order and justice within the community itself.

According to *Garner*--- "The State, as a concept of political Science and Constitutional Law, is a community of persons more or less numerous, permanently occupying a definite territory, independent of external control and possession an organized Government to which the great body of inhabitants render habitual obedience".

The essential elements of a State, thus, are:

(*i*) a group of persons acting together for common purposes;

(*ii*) the occupation of a determinate portion of the earth's surface which constitutes the home of the population;

(*iii*) independence of foreign control;

(*iv*) a common supreme authority through which the collective will is expressed and enforced.

(2) Government : The Government is the agency or organization through which the will of the State is formulated and expressed and the sovereign power of the State is exercised. While Governments change, the State remains permanent notwithstanding changes in the Government. The State and Government are thus not identical. While the State is the sovereign community itself, the Government is its organ through which it acts. The essential functions of a Government are classified as Executive, Legislative and Judicial.

(3) The Constitution : The State, it has been said is "unthinkable without a constitution of some kind". According to Bryce-

"The Constitution of the State consists of those rules or laws which determine the form of its Government and the respective rights

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and duties of it towards its citizens and of the citizens towards the Government."

The Constitution thus sets out the framework and functions of Government of a State and declares the principles governing the operation of those organs and the relation between them and the citizens of the State.

A Constitution may be written or unwritten. In an unwritten Constitution, like that of England, these fundamental rules and principles are scattered over many documents, charters, legislative enactments, judicial decisions and usages. In a written Constitution, like that of the U.S.A., these fundamental rules and principles are embodied in one constitutional document, drawn up by a Constituent Assembly or a similar constitution-making body.

(4) Constitutional Law : The Constitutional Law of the State is the law relating to its constitution. In a written Constitution, the constitutional law is identified with the Constitution which lays down the fundamental law relating to the Constitution of the State.

An unwritten Constitution, on the other hand, is composed of not only a body of legal rules recognised and enforced by the Courts, but also of a body of norms, conventions and usages which regulate the powers and functions of the different organs of Government, but are yet not enforceable by the Courts of Law. Strictly speaking Constitutional Law, therefore, includes those rules having the force of law "which directly or indirectly affect the distribution or the exercise of the sovereign powers of the State" (*Dicey*) . Thus, English Constitutional Law includes those rules of law and binding conventions which regulate the structure of the principal organs, their principal functions, and their relationship to each other.

Q. 2. Write an essay on the true Nature of the English Constitutional Law.

Ans. Nature of the English Constitutional Law : It is easy for a student of Pakistan Constitutional Law or American Constitutional Law to say as to what he means by the Constitutional Law of his country. He has merely to refer to the written Constitution and the decisions of the Courts regarding the interpretation of that Constitution. But such is not the case with a student of English Constitutional Law. The reason is very simple. The English Constitution is not a written one. There is no one document which can be said to embody the English Constitution. The English Constitution has not been made, but has grown. It is not the fruit of abstract theory, but the outcome of the practical sense of the Englishmen. No precise date can be mentioned as the day of its birth. It is out of question to name its creators.

Approaches : There are many approaches to the understanding of the English Constitutional Law. Professor Dicey has

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referred to three different approaches:--

(1) The first approach is that of the lawyer. He refers to the view of Blackstone on the nature of English Constitutional Law. But he himself admits that there is hopeless confusion of language and thought in the work of Blackstone. The statements of Blackstone are the direct opposite of truth. The lawyer's view is not realistic.

(2) The second approach is that of the historian. Dicey refers to the works of Hallam, Bishop Stubbs, Sir Thomas May and Freeman, but does not approve of their approach. According to him, a historian is primarily occupied with ascertaining the steps by which a Constitution has grown. He is deeply concerned with has question of origins. He is not concerned with the working of the administrative machinery at the present time. The chief defect of the historical approach is antiquarianism.

(3) The third approach is that of the political theorists. Dicey refers to the works of Bagehot and Prof. Hearn. He admits that these writers have explained in a very clear manner the intricate working of the English Constitution. But he points out that their defect is that they deal solely with the conventions of the Constitution. Moreover, the conventional view does not explain as to how the conventions are enforced.

According to Prof. Dicey, "Constitutional Law, as the term is used in England, appears to include all rules which directly and indirectly affect the distribution of the exercise of the sovereign power in the State". Among other things English Constitutional Law includes all rules which define the members of the sovereign power, the relation of these members to one another and the manner in which the sovereign power is exercised. These rules prescribe the order of succession to the throne, determine the form of the Legislature and its mode of election. These rules deal with ministerial responsibility. They define the territory over which the sovereignty of the State extends. They also settle the question of citizenship of the country.

Two parts of Constitutional Law : According to Dicey, the English Constitutional Law consists of two different kinds of rules:--

(1) The one set of rules is strictly speaking laws because they can be enforced by the Courts. These rules may be written or unwritten. They may be enacted by statute or derived from the mass of custom tradition, or judge-made maxims known as the common law. These are called by Dicey as "the Law of the Constitution."

(2) The second set of rules consists of the conventions,

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understandings, or habits. They are not strictly speaking laws because they cannot be enforced by the Courts. But they are important all the same because they are concerned with some very important parts of the British administrative machinery. These rules are called by Dicey as "the conventions of the Constitution" or constitutional morality.

Laws of the Constitution : Prof. Dicey has given many examples of the laws of the English Constitution. The most important is that the King can do no wrong. This means that the King is not personally responsible for any act done by him. If, for example the King of England shoots the Prime Minister of England, no Court in England can try him. But it is taken for granted that no king of England will do such a thing. The maxim also means that no one can plead the orders of the Crown or of any superior officer in justification of his own act. "There is no power in the Crown to dispense with the obligation to obey a law". Some persons are legally responsible for every act done by the Crown". The maxim--"The King can do no wrong," is based on the principle of ministerial responsibility. This means that every act of the King is countersigned by some Minister. An act of the King becomes valid only when it is countersigned by some Minister. By countersigning; the Minister becomes responsible for the act. Since the Minister becomes responsible, the King need not be held responsible. That is why it is said that the King can do no wrong.

The right to freedom of discussion, the right to personal freedom, the right of public meeting and many other rights are part of the law of the English Constitution. Other examples are the order of succession to the throne, the powers and duties of many of the Departments of the State, the duration of Parliament, the qualifications of Parliamentary electors and the tenure of office of the Judges of England.

The conventions of the English Constitution : The conventions of the English Constitution play a very important part in the administration of the country. The most important conventions are the following:--

(1) When a Bill has been passed by both the Houses of Parliament, the King cannot veto it. He must give his assent to it.

(2) Money Bills do not originate in the House of Lords.

(3) When the House of Lords sits as the highest Court of Appeal for England, it is only the seven Law Lords who sit in the House of Lords and not the other Members of the House of Lords.

(4) When the general elections are over, the King must

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summon the leader of the party which has a majority in the House of Commons, to form the ministry. Queen Victoria had to summon Gladstone in 1880 to form the ministry although she hated him from the core of her heart. The simple reason for that was the Liberal Party of which Gladstone was the leader, won the general elections of 1880.

(5) The ministry hold office so long as they enjoy the confidence of the House of Commons. They must resign as soon as they lost confidence.

(6) If a ministry has been out-voted in the House of Commons, the Prime Minister can go to the King and ask him to dissolve the House of Commons. When the Prime Minister does so, the King must order the dissolution. But if the old ministry does not get a majority in the new elections, it must resign without facing the new House of Commons.

(7) As soon as the Speaker of the House of Commons is elected, he must become a non-party man. He must stop attending meetings of his party. He must behave like any impartial person in all dealings. He is re-elected Speaker as many time as he likes. He is made a peer after his retirement.

(8) A Bill must be read a certain number of times before passing through the House of Commons.

(9) The Prime Minister must belong to the House of Commons.

(10) the King must not preside over the meetings of the Ministers.

Kinds of conventions : Prof. Dicey divided the conventions into two parts:

(1) The first part consisted of those conventions which could never be violated without bringing to a stop "the course of orderly and pacific Government.

(2) The other part consisted of those conventions which might be violated "without any other consequence than that of exposing the Minister or other person by whom they are broken, to blame or unpopularity".

In the first case, the breach of the convention leads to the breach of law. Such a convention is that which says a Parliament must meet every year. It is evident that if a Parliament does not meet for more than a year, no budget will be passed. The Government will not be authorised to levy and collect taxes. There will be no money to

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run the administration. As the collection of any tax will be illegal, any collector of tax will be liable to imprisonment. As the Government servants will not be paid any salary, the work of the Government will come to a standstill. The same is the case when a ministry does not resign even when it is out-voted in the House of Commons.

The second category of conventions includes those violations which does not bring the ministry into conflict with the law of the country. Such a thing happens when a Bill is not read a number of times in the House of Commons, or the Speaker does not act impartially or even those members of the House of Lords sit who are not landlords when the House of Lords sit as a Court of Appeal. It is to be noted that the conventions of the Constitution cannot be recorded in the Statute Book although they may be reduced to writing. The whole of the Parliamentary Procedure is a mass of conventional law and is recorded in written or printed rules. Thus, the distinction between the laws and conventions of the Constitution is not the same as the difference between the unwritten and the written law of the country. The conventions vary from generation to generation, almost from year to year, till they become good precedents which are quoted from time to time.

It is to be noted that the law of the Constitution is expounded like any other branch of the English Law.

Some more definitions : It seems desirable to conclude this question by referring to few definitions of Constitutional Law as given by great authorities. According to Lord Bryce:

> "A Constitution properly so called is a frame of political society organized by and through law, that is to say, one in which law has established permanent institutions with recognised functions and definite rights."

According to Bouvier, Constitutional Law implies:

> "The fundamental law of a State directing the principles upon which the Government is founded, and regulating the exercise of the sovereign powers, directing to what bodies or persons those powers shall be confined and the manner of their exercises".

Constitutional Law and Administrative Law : According to Holland, "Constitutional Law deals with various organs of sovereign powers as at rest, and Administrative Law deals with those organs as in motion: in other words, the first deals with the structure and the second deals with the functions of the State". Prof. Maitland differed from this view of Holland. According to him, if the view of Holland was accepted, the powers and the prerogatives of the Crown would be relegated to the sphere of the Administrative Law which was not correct. But such a view was not acceptable. The real distinction between the Constitutional Law and Administrative law is one of

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degree and convenience and not of principle. Constitutional Law deals with the general principles relating to the organization and powers of the organs of the State and their relations with one another and with the people. Aministrative Law deals with the detailed powers and functions of the administrative authorities, whether they are the local authorities, public departments or the civil service. Prof. Keith has rightly remarked: "It is logically impossible to distinguish Administrative from Constitutional law and all attempts to do so are artificial."

Q. 3. What is the distinction between a written and unwritten one Constitution?

Ans. Distinction between written and unwritten Constitution : A written Constitution is one in which the fundamental law of the country is put down in black and white in a document. When we say that Pakistan has a written Constitution, what we mean is that the fundamental law of the country according to which the administration of Pakistan is carried on, is found in the Constitution which came into force in 1992. Similarly the written Constitution of America is to be found in the Constitution which came into force in 1789.

When we say that England has an unwritten Constitution, what we mean is that the fundamental law of England which regulates the administrative machinery of the country, is not to be found in any formal document. We have to look to many sources to find out the law which runs the British Administrative Machinery. Those are the great Constitutional Landmarks like the Magna Carta and the Bill of Rights, the Statutes like the Parliament Act of 1911, the Common Law of England, the judicial decision and the conventions. England is the only country in the world which is said to have an unwritten Constitution.

The fundamental thing to be noticed in this connection is that in a written Constitution, the Legislature of the country is not free to pass any law it likes. The Constitution is the Supreme Law of the country. Any law which goes against it has to be declared *ultra vires*. That law cannot be enforced in the country. But that is not the case in a country which has an unwritten Constitution. Thus, the British Parliament has complete freedom to pass any law it pleases. In America the Legislature has always to keep in mind the fact that the law which it is going to enact must not in any way be repugnant to the Constitution of the country.

It is, however, to be noted that the distinction between a written Constitution and an unwritten one is more a matter of degree than of kind. The reason is that even in a written Constitution there grows up in the course of time what are called conventions. The example of U.S.A. can make this point clear. Although the U.S.A. has a written

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Constitution there have grown up many conventions. Although the fathers of the American Constitution made the Presidential election indirect, it has actually become direct. Another convention is that President will not be elected for the third time. The only exception is that of President Roosevelt. Another convention is what is known as Senatorial courtesy. The growth of the party system has also linked up the Legislature and the executive of U.S.A., although the American Constitution is based on the principle of separation of powers. Another convention is that the President gives weekly interview to the Washington Press.

The same can be said .about the unwritten Constitution of England. We find that in England the Constitutional Law is to be found not only in the conventions, but also in the great Constitutional landmarks, the Statutes, the Common Law of the country, and the Judicial decisions.

It is clear that the unwritten Constitution of England has certain written elements in it. The written Constitution of U.S.A. has unwritten elements in it. What is to be noticed in that the Constitution of every country, whether it is written or unwritten is partly written and partly unwritten. In some cases, the written element is more. In other cases, the unwritten element is more. It is all a question of degree and nothing more.

Q. 4. What are the implications of a written Constitution?

Ans. Implications of written Constitution : A written Constitution, as distinguished from an unwritten Constitution, is one which has been formally enacted at a particular time, and is a work of 'conscious art', rather than a product of a historical evolution. In modern times, written Constitutions are drawn up by a Constituent Assembly, through which the popular will expresses itself; thus, the Constitution of India has been framed by the Constituent Assembly which was elected for this purpose. Usually, a written Constitution is contained in a single instrument, but sometime it is supplemented by subsidiary instruments. Thus, the Government of India Act, 1935 was supplemented by a number of Order-in-Council. The following are the usual characteristics of a written Constitution:--

(*i*) It is instrument of special sanctity which cannot be changed by the usual procedure prescribed for ordinary legislation. In other words, it is not alterable by the ordinary process of legislation. There are of course, exceptions to this general rules. Thus, though the Indian Constitution requires a special majority for constitutional amendments, and in amendments affecting the federal system, the concurrence of the State Legislatures is also required, the Constitution itself lays down that the change of many provisions in the Constitution will not be

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treated as 'amendment' of the Constitution, so that these provisions may be amended by the ordinary process of legislation. Barring these exceptions, a written Constitution cannot be amended by the ordinary process of legislation;

(*ii*) A written Constitution, thus, provides the organic or fundamental law with reference to which the validity of the laws enacted by the Legislature are to be tested. The law enacted by the Legislature cannot transgress or violate the provisions of the fundamental law. If they do, it would be the duty of the Courts to declare them as void. Thus, though there is no express provision in the American and Indian Constitutions specifically entrusting the Courts with this duty the Judiciary in both countries has assumed this power on the ground that the Judiciary must enforce the fundamental law. This is why, under a written Constitution, the Judiciary is called the guardian of the Constitution;

(*iii*) In fact a written Constitution involves a division of powers and prescribes a limited Government. The Constitution divides the sovereign powers amongst the three organs or Government. Executive, Legislature and Judiciary so that the powers of each are defined by the Constitution, and none can act beyond its own powers or usurp those that legitimately belong to the other under the Constitution;

(*iv*) A written Constitution is usually rigid, by reason of the extraordinary difficult process prescribed for the changing it. But the degree of rigidity varies under different Constitutions. Thus, no provision of the American Constitution can be changed by any process short of constitutional amendment but it is judicial interpretation which has saved the Constitution from being static or unworkable. On the other hand, the Constitution of Pakistan makes some of the provisions of the Constitution amendable by ordinary legislation, while the process of constitutional amendment itself is easier than that prescribed by the American Constitution.

Q. 5. What is the distinction between a Flexible Constitution and a rigid Constitution and what are the merits and demerits of these two types of Constitutions?

Ans. Distinction between flexible and rigid Constitution : According to Prof. Dicey, a flexible Constitution is one under which every law of every description can be changed with the same case and in the same manner by one and the same Legislature. A rigid

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Constitution is one in which the method of changing the Constitutional laws is different from that which is used for passing ordinary laws.

In a rigid Constitution, there is a distinction between the Constitutional of fundamental laws and the ordinary law. The Constitutional laws deal with the framework of the Constitution, but that is not the case with the ordinary laws which deal with the day-to-day administration of life of the people. The method for changing the Constitutional Law is more complicated than for the passing of the ordinary laws. For example, the ordinary laws in U.S.A. can be passed by the American Congress by a bare majority, but in the case of Constitutional Laws, the amendment must be passed by a two-thirds majority of the Congress and three-fourths of the States. It is to be noted that in the case of a flexible Constitution, the method of amending the Constitution is the same as that for passing the ordinary laws.

In a rigid Constitution, the Legislature is not a sovereign law-making body. The Legislature must work within the framework provided by the Constitution. In the case of a flexible Constitution, the Legislature is sovereign and can pass or repeal any law it pleases.

In the case of flexible Constitution, as the Legislature is competent to pass any law, there is no question of the Courts declaring any law *ultra vires*. But in the case of rigid Constitution, the Courts can declare any law *ultra vires* or invalid if that law is repugnant to the Constitutional law of the country.

In the case of a rigid Constitution like that of U.S.A. the right of the individuals are to be found in the Constitution. But in the case of a flexible Constitution like that of England the rights of the people are guaranteed by the judicial decisions given from time to time by the Court of the country.

Merits and demerits of flexible Constitution : The real merit of a flexible Constitution is that it can be adapted to the circumstances of the country. It is admitted on all hands that the function of the law is to serve the needs of people of the country. As the needs vary from time to time, it is necessary that the law of the country also must change with changing needs of the people. When the present American Constitution was made, that country was an agricultural country and the Constitution was made taking into consideration the needs of the American people at that time. Today America has become the most industrialised country in the world. It is necessary that the law of the country must change if it is to serve the needs of the new society. This is not possible on account of the rigidity of the American Constitution. Had America got a flexible Constitution, there would have been no difficulty to bring about the change in the law. As it is, there is a lot of waste and lack of cohesion. In the case of a flexible Constitution, the law can be changed to meet

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the needs of the country. It is not difficult to provide for any emergency that might arise. When the war broke out in 1939, the English Prime Minister, Mr. Chamberlain was found to be unequal to the task. The result was that he was changed and Churchill led the nation during the war days. A similar thing happened in America in 1929. President Hoover was found unequal to the task. In spite of the crisis, nothing could be done till 1933 when Roosevelt became the President and assumed office. The rigidity of the French Constitution has also cost the French heavily. Their Constitution could not be changed to meet the crisis. A flexible Constitution avoids the necessity of a revolution because it can be changed to meet the needs of the people. It is rightly said that a flexible Constitution bends but does not break. This is the great virtue of the English Constitution which had weathered many a storm.

Critics point out certain defects of a flexible Constitution. According to Lord Bryce, the flexibility of the English Constitution places "the very Constitution at the mercy of a momentary gust of Parliamentary opinion." That is not a desirable thing. There must be certain laws in a country which are fundamental and which cannot be changed. These laws should act as an anchor. They should be stable. Their existence should not depend upon the vagaries of the people at any moment. If they are changed arbitrarily, they are liable to upset the very life of the people. Such a fear exists in England where the all powerful British Cabinet can legally do whatever it pleases. But it may be pointed out that the conservative nature of the Englishmen is a sufficient safeguard against such a danger.

Merits and demerits of rigid Constitutions : The great merit of a rigid Constitution is that it is definite and certain. Everybody knows that the Constitutional Laws of America is to be found in what is known as the American Constitution. All that is required is to interpret law which is embodied in a document. There is no vagueness about a rigid Constitution. It acts as an anchor. It puts a check on the rash and hasty legislation. It creates a spirit of reverence among the people for the existing institutions of the country. According to Lord Bryce, rigid Constitution "strengthens their conservative instinct, their sense of the value of the stability and permanence in political arrangements." A rigid Constitution is very necessary for a Federal Government because the units which join the federation on certain conditions, do not want them to be altered. A rigid Constitution is a good guarantee.

The great defect of a rigid Constitution is that it cannot be changed according to the needs of the country. The result is that a rigid Constitution is not suitable for an emergency. Since it does not bond, there is very likelihood of its breaking down. A rigid Constitution is not suitable to a progressive and growing country.

Q. 6. Discuss the merits and demerits of a Parliamentary

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and Presidential form of Governments.

Ans. Parliamentary form of Government : A Parliamentary form of Government is that in which the executive is responsible to the Legislature. The ministry belongs to that party which commands a majority in the Lower House and continues to remain in office so long as it enjoys the confidence of the House. The classic example of a Parliamentary Government is that of England where the Cabinet is responsible to the Parliament. A similar system prevails in France, Canada, Australia, etc.

Presidential form of Government : Under a Presidential form of Government, the executive is not responsible to the Legislature, Neither the Legislature can turn out the executive nor the executive the Legislature. Both are elected independently by the people. Both of them have fixed periods of tenure and do not depend upon one another.

Merits : Following are the merits of a Parliamentary system of Government:

(1) The one great merit of a Parliamentary system is that it ensures harmonious co-operation between the executive and Legislature. The Cabinet is merely a committee of the Legislature, and as such has complete control over it. Since the Cabinet has a majority in the Legislature, it can be sure that whatever it puts before the Legislature, will be passed without any difficulty. The executive can decide upon the type of action to be followed and it can be sure of the support of the Legislature to the policy. There is absolutely no possibility of any conflict for if a Cabinet fails to carry the House with it, it must resign and allow another ministry to come in which must enjoy the confidence of the majority of the House. Thus, the possibility of a conflict is ruled out.

But the things are different in a Presidential form of Government. Both the executive and Legislature are independent of each other. There is no guarantee that the President and Congress (who are elected at different times) will belong to the majority party. It is possible that the Congress may refuse to pass those laws which the executive may recommend for passage. Thus, there may be no harmony between the two. This will not allow the smooth working of the administrative machinery. The experience of America should open the eyes of the students of Constitutional Law. There is enormous waste and inefficiency.

(2) Under a Cabinet system, the executive is responsible to the Legislature. Those who administer the country are also responsible for it. If something goes wrong in a particular department, the Minister-in-charge is

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responsible for it. Members may ask questions and supplementary questions. A vote of no-confidency may be moved against a particular Minister or ministry as a whole. The ministry must give a satisfactory explanation to the House otherwise it is liable to be thrown out. Under the Parliamentary system, responsibility is continuous and immediate. The ministry has to go that very moment. The people have the power and means to remove it at any time they regard it as undesirable.

But under a Presidential system the President and members of his Cabinet are not responsible to the Legislature. The President is responsible to the people directly. The result is that no immediate action can be taken against the executive. The people may have to wait for years before they get an opportunity to remove the executive which they do not approve of. It can be maintained that responsibility to be real must be immediate or it is no responsibility at all. Delay is fatal. You cannot allow the Government to continue for a few years when it makes serious blunders at the very beginning. There is no response to what the people demand at any time. The Legislature and the executive may go out of touch with the public opinion and may not act in the best interests of the public.

(3) Another merit of the Cabinet system is that it has flexibility and elasticity which are useful in times of emergency. Thus, in a country like England. Churchill could replace the weak ministry of Chamberlain in 1940 and the grave situation could be handled promptly and firmly. But such a thing is not possible under American system. The Congress is elected for a fixed period. The President is chosen for a fixed period and cannot be removed. All arrangements are for fixed periods. There is no elastic element. Everything is specific, rigid and certain. Whether the Government works satisfactorily or not it cannot be replaced. Such a thing happened in 1929 when Mr. Hoover was President. Although he was considered to be absolutely unfit to face the economic crisis which America had to face, he could not be removed. The country had to suffer for four long years before Roosevelt succeeds him as President in 1933.

(4) Cabinet system secures men of outstanding ability and experience as leaders of the executive and Legislature. Those persons alone become Ministers who have been in Legislature for many years and know the ins and outs of the trade. But in a Presidential system, the President is authorised to appoint anybody in his Cabinet. They possess no Parliamentary experience and knowledge about working of the administrative machinery.

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The Cabinet system is also educative. All the parties approach the voters with their individual programme. They canvass for support. The opposing parties put before the people their respective viewpoints. The result is that people are put in a position to make intelligent decision. But such an advantage is possible even in the case of Presidential form of Government.

Demerits : Following are the demerits of Cabinet system:

(1) The great demerit of the Cabinet system is that it combines the executive with the Legislature and this is against the theory of separation of powers. But this is merely a theoretical objection.

(2) Where there are only two parties in a State, the party having the majority in the Legislature becomes dictatorial in its attitude. Since the Ministers are backed by a solid majority, the executive can afford to do whatever it likes. Thus, the Legislature virtually abdicates its function in favour of the Cabinet. The real Government of Britain is carried on neither in the House of Commons nor in the Cabinet but in the private conferences between the Ministers with their principal officers and the representatives of the people, Lord Bryce says that the Cabinet system "intensifies the spirit of party and keeps it always on the boil. Even if there are not important issues of policy before the nation there are always the offices to be fought for. One party holds them, the other desires them and the conflict is unending. It is like the incessant battle described as going on in blood-vessels between the red corpuscles and invading microbes."

(3) Professor Dicey Mentioned two defects in the Cabinet system. It is a week Government in times of war and grave national crisis. It is a Government of extremely partisan character. The party politics is the determining factor.

(4) Professor Laski says that the Cabinet system gives the executive an opportunity for tyranny. The Legislature becomes an organ for the registration of decisions which it cannot criticise or alter.

Presidential system : The merit of Presidential system is that it gives a strong executive which is essential for war. Once war is declared, a Wilson or a Roosevelt becomes a dictator. All powers are in his hands and he has no fear of his dismissal or fall as in a Parliamentary Government.

The critics point out that the Presidential system is autocratic because the President is not under the control of the Congress. The

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system is irresponsible because the executive is not responsible to the Legislature. The executive cannot be dismissed in spite of its repeated acts of tyranny. Moreover, the executive has no initiative in the matter of legislation.

Q. 7. Distinguish between a Unitary Government and a Federal Government. What are the three leading characteristics of a completely developed Federal State?

Ans. Distinction between a Unitary Government and Federal Government : An essential feature of a Federal Constitution is the division of powers between the Central Government and the units, whether Provinces, States or cantons. The division of powers is not similar in all cases. U.S.A. and Australia follow one plan, Canada another. There may be executive spheres of jurisdiction for the federation and units and some concurrent powers for both. The residuary powers may be with the units as in Australia and U.S.A. or with the Federation as in Canada. On the other hand, there is on such division of powers in a Unitary Government. All the powers are in the hands of the Central Government which can and does exercise them in whatever way it pleases.

In a Federation, the Federal Government is supreme in its own sphere and so are the units. One cannot interfere in the sphere of jurisdiction of the other. There is the federal judiciary to see that each of them exercises only those powers which are definitely allotted to it. But in the case of a Unitary Government, the powers enjoyed by the units are absolutely dependent upon the sweet-will of the Central Government which can increase or decrease them at any time. It is not for the units to grumble. There is no Court to hear their appeals. The Central Government is all in all. All the units must do what it says.

In a Federation, there is supremacy of the Constitution. A Federation is a contractual units and its Constitution embodies all the terms on which the units agree to join it and would like to continue in it. In such a case, the Constitution becomes all-important. Any law which violates any provision of the Constitution becomes *ultra vires*. This is the case in the U.S.A. where the Constitution is supreme and whenever a new law is to be passed, the first concern of the politician is to find out whether that is *ultra vires* or *intra vires* of the Constitution. What matters is not whether that is for the good of the people or not. The first consideration is whether that is permissible under the Constitution or not. But in the case of a Unitary Government, the Central Government can frame any law which it considers good for the people. That is so in England and France.

It is to be noted that in a Federation there is a strong desire on the part of the units to maintain their separate entry, although they would like to unite for certain purposes. The units are not prepared to merge themselves. The Federal sentiment of union without unity is

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essential for the successful working of a Federation. But in the case of Unitary Government, the units merge themselves into the Central Government and also their separate existence. The Central Government is all in all.

A Unitary Government works successfully among those persons who are homogeneous. But a Federal Government will serve the heads of that country where the different parts have varying interests which demand satisfaction. In such a case those parts can unite for certain common objects and manage their other affairs independently. A federal system alone helps the combination of the territories which vary considerably from one another and in spite of that enjoy the fruits of union and autonomy.

Every Federal Constitution must be written and rigid so that the units be sure of their autonomy in the future also. But in the case of Unitary Government, no such thing is essential. The Central Government may do whatever it pleases. Its power may be based on conventions or legislation. The Central Government is to all intents and purposes omnipotent.

Leading characteristic of a Federal State : There are certain salient leading characteristics of every Federal State:--

(1) The first feature is the supremacy of the Constitution. A Federation is a contractual union and the terms of the contract by which the units join the Federation are embodied in the Constitution. It is natural that the contracting parties should be anxious to see that the terms on which they join the Federation are not varied to their disadvantage. Consequently, in a Federal State, the Constitution is regarded to be a sacred document. All legislation which is attempted to be passed by the Legislature must fit in the frame-work provided by the Constitution. If any law is repugnant to the Constitution that is declared *ultra vires* by the Courts.

(2) Another characteristic of a Federal State is the division of powers between the Center and the Units. In the case of U.S.A., the residuary powers are with the State, but in case of Canada, those are with the Centre. There is no such division of powers in a Unitary State. In a Federal Government, there had to be a division of powers because the units want a union but not unity. They want to be together but at the same time they are determined to maintain their individually in certain matters. It is for this reason that the units are given freedom in a particular field and to do so the powers have to be divided between the Units and the Centre.

(3) Another characteristic of a Federal State is the authority

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of the Courts to declare laws *ultra vires* and invalid if and so far as they are repugnant to the Constitution. This work is given in a Federal State to a Federal Court or Supreme Court. It is the duty of the Supreme Court to see that the Federal Government and the units work in their respective spheres. "The Bench therefore can and must determine the limits to the authority both of the Government and the Legislature; its decision is without appeal; the consequence follows that the Bench of Judges is not only the guardian but also at a given moment the master of the Constitution."

Q. 8. What are the salient characteristics of the English Constitution?

Ans. Salient characteristics of English Constitution : There are many characteristics of the English Constitution which are as follows:--

(1) The English Constitution is unwritten. It is not to be found in any one document as is the case in U.S.A. It is true that some of the Constitutional Law of England is to be found in the Magna Carta the Bill of Rights, the Petition of Rights, the Act of Settlement. Parliament Act of 1911, Reform Acts of 1832, 1876, 1884, 1918 and 1928, Act of Union between England and Scotland (1807), but in addition of these, there are a large number of conventions which play a very important part in the working of the administrative machinery of the country. It is on account of these conventions that the English Constitution is said to be convention-ridden.

(2) There is a lot of a difference between theory and practice in the English Constitution. That is why it is said about the English Constitution that "nothing is what is seems, or seems what it is". This is mainly due to the large number of conventions which have grown in England through the course of many centuries. It is the existence of these conventions that creates divergence between theory and practice. Legally, all the powers are in the King of England, but actually the powers have gone into the hands of the British Cabinet on account of the Cabinet system in the country by means of conventions. Examples can be multiplied.

(3) Another characteristic of the English Constitution is that it is evolutionary. While we can say that the American Constitution was made towards the end of the 18th century or the Canadian Constitution is to be found in the British North America Act of 1867, the same cannot

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be said of the English Constitution. Nobody is its creator. It has grown during the past many centuries. Neither Simon nor Edward was its creator.

(4) Unlike Germany or Ireland, England has nothing which can be called by the name of the fundamental rights of the English. The freedoms of the Englishmen are guaranteed to them by the ordinary law of the land. The British judiciary has played a noble part in this field.

(5) English Constitution is not rigid but flexible. This means that the amendment of the Constitution is easy. It is to be noted that unlike U.S.A., the ordinary laws and the Constitutional Laws of the country can be amended in the same manner. There is absolutely no difference between ordinary laws and Constitutional Laws as regards their amendment. In the case of U.S.A., the Constitution can be amended only if the two-thirds of the Congress and three-fourths of the States agree to the amendment. But in the case of England, a Bill which changes some important aspect of the Constitutional Law of the country, can be passed by a bare majority in both Houses of English Parliament.

(6) The British Constitution is Unitary and not Federal. There is no division of powers between the Federal Government and the units. All powers are exercised by the Central Government.

(7) England has a Parliamentary form of Government. The English King is a Constitutional head. He has no powers at all. All power is in the hands of the ministry which is taken from the Parliament and is responsible to the House of Commons. It holds office so long as it enjoys the confidence of the House of Commons. The actions of the Government are subjected to a critical examination by the members of the House of Commons who are the representatives of the people. In this way, the Government is run according to the interests and wishes of the people of England.

(8) Another feature of the British Constitution is the rule of law. To put it bluntly, it merely means that there is the rule of law in England and not of any individuals. It emphasises the sovereignty of law of the country. No person is to be punished unless and until it is definitely proved that he has violated some law of the country. The same law applies to everybody whether he is a poor man or a great official of the Government. The same is the case with the Courts. There are no separate Courts

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for the Government servants. They are not given any privilege.

(9) Another characteristic of the English Constitution is the sovereignty of Parliament. In the case of written Constitutions, the Legislature is not free to do what it wants. It must be guided and controlled by the terms of the Constitution. The Legislature cannot pass any law which is against the Constitution. If it passes any such law, that law is declared as *ultra vires* by the Courts of the country. But that is not so in the case of England. In this country, the British Parliament can do what it pleases. De Lolme was right when he said that the British Parliament can do anything but make a man or a woman a man. It simply means that the British Parliament can do anything which is rational and not absurd.

Q. 9. "Federalism is the union of several states without unity". Discuss.

Ans. Federation : "Federalism", says Dicey, "is a natural Constitution for a body of states which desire union and do not desire unity" "A federal state is a political contrivance intended to reconcile national unity and power with the maintenance of state rights". It is created whenever several existing states find it advantageous, for geographical, racial or political reasons, to combine themselves under a common or national organisation so far as their common interests are concerned while retaining independence regarding all other matters which are not primarily of common interest. The individual states are not ready to give up their independence or sovereignty altogether; and if they really so intend, the result would be a unitary form of state and not a federation. They do not desire 'unity' but only 'union'. Thus in the U.S.A. the 48 component States are not administrative divisions but Constituent members of the Union, and are in no sense subordinate to the latter in their own spheres. There is a double Government and double citizenship under a perfectly co-ordinate organisation.

CHAPTER 2

SOURCES

Q. 10. What are the Sources of English Constitutional Law?

Ans. Sources of English Constitutional Law : Following are the sources of the English Constitutional Law:--

(1) The great Constitutional landmarks like the Magna Carta (1215). the Petition of Right (1628), the Bill of Right (1688), etc.

(2) Statutes or Acts of Parliament such as the Act of

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Settlement (1710), the Parliament Act of 1911, the Representation of the People Acts of 1918 and 1928, the Reform Acts of 1832, 1867 and 1884, the Act of Union between England and Scotland, 1707, the Habeas Corpus Acts of 1679 and 1816.

(3) Common Law which consists of precedents and customs which are established by usage. It is to be noted that the prerogatives of the King and the privileges of Parliament are based on Common Law.

(4) Treaties such as the Act of Union of England with Scotland in 1707 and with Ireland in 1800.

(5) Another source is the judicial decisions. *Bushell's* case established the independence of the Juries (1670). The case of *Howell* (1678) established the immunity of the Judges. The case of Somersett established the absence of slavery on the English soil (1771). The case of Danby established the doctrine of ministerial responsibility and the equality of all before the law. Dicey says that English Constitution, far from being the result of legislation in the ordinary sense of the term, is the fruit of contests carried on in the Courts on behalf of the rights of the individuals.

(6) The text-books are also a source of Constitutional Law. Those books are *Anson's Law and Custom of the Constitution*. Bagehot's *English Constitution*, May's *Parliamentary Practice*, Dicey's *Law of the Constitution*. The importance of these books lies in the fact that all the problems of the Constitutional Law are not covered by legislation or litigation.

As already discussed above, the English Constitutional Law, according to Dicey, consists of two different sets of rules. The one set of rules are strictly speaking laws because they can be enforced by the Courts. These rules may be written or unwritten. They may be enacted by statute or derived from the mass of custom, tradition or judge-made maxims known as the Common Law second set of rules consists of the conventions, understandings or habits. The conventions will be dealt with in a different Chapter.

Q. 11. "The English Constitution is a part of the Common Law." Discuss.

Ans. Importance of the Common Law : This statement emphasises the important part played by this Common Law in England. It is to be noted that only in recent times the Parliament has been forced to turn out a lot of legislative work. That may be due to many causes. But that was not the case before. Most of the work was done in England according to the Common Law of the country which had been developed by the travelling Judges in the course of

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centuries. That law had been also codified from time to time. By Common Law the King of England was the source of all powers and authority unlimited by any restraint whatsoever. Some of the powers of the King have been curtailed by Parliament, but the King has still been left with some of the powers given to him by Common Law. This discretionary power is known as the prerogatives of the King. Formerly, Common Law used to regulate the question of succession to the throne of England, but now it is done by the Act of Settlement which was passed by the British Parliament.

Q. 12. "The English Constitution is one long system of checks and balances". Expand.

Ans. System of checks and balances : The English Constitution represents a most successful product of the mature and prudent understanding of a politically minded people. The outstanding excellence of the system lies in the smooth and harmonious working of an organism having highly balanced and integrated parts. During the long story of its volition, each member of the constitution has been limited and restrained by another as occasion has arisen, yet without producing a deadlock at the end. Thus--

(*i*) The supreme executive power is vested in the Crown who is absolutely immune from any responsibility. But the Crown cannot exercise any of the powers except through Ministers who are chosen by and responsible to the elective House of the Legislature, and through them to the people.

(*ii*) The Ministry, or the Cabinet exercises the executive and administrative powers, but they are controlled on the one hand, by the permanent executive or the body of experts known as the Civil Service, and on the other hand by the House of Commons which can criticise and censure each of its acts and ultimately force it to resign.

(*iii*) The House of Commons can displace a Ministry by refusing supplies or by a vote of want of confidence the Ministry has got a corresponding power of dissolving Parliament by virtue of the King's prerogative. In any case it is the opinion of the people which will ultimately bring the machinery back to equilibrium.

In fact the harmonious operation of these three bodies, the Cabinet, the House of Commons and the people is the most remarkable feature of the English Constitution. In the words of Bryce, "The delicate equipoise of the ministry the House of Commons, and the nation acting at a general election, is the secret of the smooth working of the British Constitution". Thus, the House of Commons can call the ministry of account for every act, and by refusing supplies,

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compel their resignation. The ministry on its side, is not defenceless, but can dissolve Parliament and ask the people to judge between it and them. Parliament when it displaces a ministry does not strike at the executive authority; it merely changes its agents. The ministry when it dissolves Parliament, does not attack Parliament as an institution, but asks the country to change the individuals who compose it. Both the House of Commons and the ministry act and move in the full view of the people who sit as arbiters prepared to judge in any controversy, that may arise.

Q. 13. "There is a real dualism in the English Constitution--the Crown in Parliament and the Crown in Council" (Anson). Expand. "There is not only a sovereign Legislature but also a sovereign executive in the English Constitution; each being supreme in its sphere". (Savadhikan). Explain.

Ans. Real dualism in English Constitution : According to Anson, the theory of indivisibility of sovereignty (which means that the supreme power in the State cannot be divided between several organs) is not applicable to the English Constitution. To say that Parliament is sovereign only means that it is the supreme legislative power; the executive power is vested in a different body which is no less supreme in its own sphere. There was a time when both these powers were weilded by the same body. The Crown-in-Council at once made laws and transacted the business of Government. As the business of Government increased the conduct of administration passed into the hands of the servants or ministers of the Crown, while for the increased costs of Government the Crown had to apply to the representatives of the people. Now legislation, which meant the redress of grievances, was made a condition precedent to 'supply', and thus the law-making and taxing power passed into the hands of Parliament--a body distinct from the executive who are the ministers of the Crown. The two powers were thus separated---though the Crown remains the common element in both, and the two bodies, consequently, are called King-in-Council, and King-in-Parliament. It is true that the executive is chosen in deference to the view of the majority of the House of Commons but at any particular point of time, the executive exercise real and substantial power, which cannot any sense be said to be "dictated by the majority of the House of Commons."

CHAPTER 3
SOVEREIGNTY OF PARLIAMENT

Q. 14. What do you understand by Sovereignty of Parliament and what are the limitations on its exercise?

Ans. Sovereignty of Parliament : In the words of Prof. Dicey, "The Sovereignty of Parliament is (from a legal point of view) the

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dominant characteristic of our political institutions". By Parliament is meant the King, the House of Commons and the House of Lords or King-in-Parliament. Sovereignty of Parliament means that Parliament can do anything. It is supreme over all. There is no law which is above it. All must obey it.

Two aspects of sovereignty : According to Dicey, sovereignty of Parliament has two aspects; positive and negative. By positive of aspect sovereignty of Parliament we mean that Parliament has legislative authority. According to Blackstone, it has the power of making, confirming, enlarging, restraining, abrogating, repealing, reviving and expounding of law, concerning matters of all possible denominations, ecclesiastical or temporal, civil, military, maritime or criminal. It can regulate the succession to the throne. It can do everything that is not naturally impossible. It is for this reason that some have talked of the omnipotence of Parliament. De Lolme said: "It is fundamental principle with English lawyers that Parliament can do everything but make a woman a man and a man a woman". Burleigh said, "England could never be ruined by the Parliament". "The power and jurisdiction of Parliament is no transcendant and absolute that it cannot be confined, either for causes or persons within any bounds."

Example : Examples can be given to show that Parliament can do anything it pleases. The Act of Settlement (1701) shows how Parliament could set aside the claims of dozens of rightful heirs to the throne. The Acts of Union of 1707 and 1800 show that Parliament could do such great things as the creation of United Kingdom. But the most important Act which illustrated the sovereignty of Parliament is the Septennial Act of 1716. A Parliament which was elected only for three years Prof. Dicey says that the importance of the Act lies in the fact that the Parliament which decided to represent the people for seven years instead of three, might decide to represent the people for ever.

Parliament can pass not only public Acts, it can declare an infant or a minor of full age. It can naturalize an alien, and make him a subject-born. It can bastard a child that by law is legitimate. It can legitimate one who is illegitimate and born before marriage absolutely.

Parliament can pass laws which affect certain persons and certain localities. It can pass private Bills which refer to municipalities, railways or other corporations.

The passing of the Acts of Indemnity shows that Parliament can legalize what was illegal at the time when it was done. Such Acts are usually passed after a period of emergency to absolve the executive of responsibility for the breach of laws.

Negative aspect of sovereignty : By negative aspect of sovereignty of Parliament we mean that there is no other competing

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legislative authority in the country. It is wrong to say that the Proclamations made by the King can in any way take away from the sovereignty of Parliament. These Proclamations cannot create new laws. The are subject to the authority of Parliament.

Resolutions passed by one House or both Houses of Parliament do not have the force of law. The case of *Stock Dale v. Hansard* shows that a resolution of Parliament has no legal authority.

The sovereignty of Parliament is not affected by the will of the voters. Voters cannot enact rival legislation. They act only through Parliament. They may elect the representatives, will pass laws. but they cannot pass laws themselves.

Judge-made laws are subordinate to the laws of Parliament and do not take away from the sovereignty of Parliament. The interpretations given to the laws by the Judges are not in any way binding on the Parliament which can pass laws setting them aside.

Alleged limitations : Dicey points out three alleged limitations on the sovereignty of Parliament:

(1) It is said that Parliament can pass only moral laws. But dicey says that this is no limitation. Law is law whether it is moral or not, it is law because it is enacted by the Parliament. Law is judged not by its contents, but by its form.

(2) It is contended that Parliament cannot touch the prerogatives of the King. But the history of England shows that Acts of Parliament have reduced the King's prerogatives to the present insignificant position. The Bill of Rights is the case in point.

(3) Some contend that a Parliament cannot modify or repeal the Acts passed by a previous Parliament. But the changes made in the Acts of Union of 1707 and 1800 by subsequent Parliament prove that a new Parliament can change or set aside the laws of the previous Parliament. The disestablishment of the Church of England in Ireland in 1869 proves that what was intended to remain for ever was set aside by the Parliament of 1869. The Irish Act of 1922 altogether repealed the Act of Union of 1800. The Act of Union of Scotland also was amended in 1853.

Dicey remarks that "Parliamentary sovereignty is, therefore, an undoubted legal fact".

Actual limitations : Of course, there are two actual limitations on the sovereignty of Parliament. These are the external check and the internal check. The internal check is that Parliament will do only that which its members desire. A Protestant Parliament cannot pass laws giving privileges to the Catholics. Parliament will not pass a law

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which creates all sweepers of England Peers. It will not do so because of the ridicule to which it will be subjected by the people. The external check comes from the opposition of the people to the laws passed by the Parliament. The Parliament will not pass a law which is bound to be challenged by the people. Both the checks can be explained in another way. Parliament can pass a law that all the blue eyed babies in England will be put to death but the members of Parliament must go mad before they pass such a law and the people must become stupid before they submit to it.

Q. 15. "Parliament cannot bind its successors" Explain.

Ans. Binding of Parliament Successors : It has already been noted that the Parliament at any given time being sovereign, one Parliament cannot by any of its acts legally bind its successors, or, conversely Parliament is not bound by acts of its predecessors. [The life of one Parliament, it should be noted, is the period covered by the sittings of the Legislature between its summons and its termination by dissolution or lapse of time]. The maxim if also otherwise expressed--

"Acts derogatory to the Power of subsequent Parliaments bind not."

Thus, by the Irish Church Act, 1869, Parliament disestablished the Irish Church, though the maintenance of the Established Church in Ireland was made a fundamental term of the Union under the union with the Ireland Act, 1800.

But though there is no legal bar to any Parliament to disregard the will of its predecessor, in fact it may be constrained to refrain from such a course, owing to the pressure of changed circumstances Thus, the Statute of Westminster, 1931, enacted that no Act of the British Parliament, passed after the commencement of the Statute shall extend to any Dominion unless the latter has consented to that effect. It is legally competent to any future Parliament to amend or repeal the Statute of Westminster itself, but no Parliament would probably venture to so do owing to Political reasons. As Lord Snakey observed, the power of a future Parliament to abrogate the Statute of Westminster is "legal theory and has no relation to *realities*."

Q. 16. Criticise the following statement-- 'The sovereignty of Parliament is, from a legal point of view, the dominant characteristic of our political institutions.' Is the above statement an accurate description of Parliamentary sovereignty, at the present time? If not, why not?

Ans. The theoretical sovereignty of Parliament has suffered cutrailment in two directions in recent times--

With the growing complexity of the subject-matters for legislation. Parliament has been compelled to leave a large share of legislation to the administrative departments which possess expert

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and detailed knowledge about the different matters.

"In former days Englishmen were said to be distinguished from their continental neighbours by their 'instinctive scepticism about bureaucratic wisdom'. Consequently Parliament attempted, in making laws, to provide beforehand, by precise statutory enactment, for every contingency which might reasonably be expected to arise. This naturally rendered the form of English statutes exceptionally elaborate and detailed. Parliament has recently shown a marked tendency to abandon this tradition. In our legislative forms we have moved towards continental methods....Many modern statutes are mere *cadres*, giving no adequate indication of their ultimate scope. They lay down general rules and leave it to the Departments concerned to give substance to the legislative skeleton by the issue of (rules and) orders." (*Marriott*).

The doctrine that in England there is only one law-making power is thus losing its practical significance.

Externally, the sovereignty of the Imperial Parliament has received a great blow at the passing of the Statute of Westminster, 1931.

Q. 17. Does the Sovereignty of Parliament imply that Parliament can bind its successors to anything?

Ans. Implication of Parliament : It is true that Parliament can do any thing which is not humanly impossible. But this does not imply that it can bind its successor to any definite course of action. The British Parliament in 1880 brought about the Union of England and Ireland. It is true that it was mentioned in the Act of Union that the Union was lost for ever, but we know from history that Ireland has become completely independent, leaving aside a part in the North. During the 19th century , certain clauses of the Act were changed. The Irish Church Act of 1869 disestablished the Church of England in Ireland.

The Triennial Act had fixed the life of Parliament at three years, but the Septennial Act of 1716 increased it to 7 years. The Parliament Act of 1911 reduced it from 7 to 5 years.

A new Parliament can change the system of representation in England. There is no restriction in this matter. If such a thing is not possible, the progress of the country will be stopped.

But there are certain things which have been done by the previous Parliaments and which future Parliaments will not think desirable to cancel. No future Parliament of England will ever think of repealing the Statute of Westminster of 1931. Lord Sankey rightly said that such a possibility was only in "legal theory and has no relation to realities". The same can be said about the Indian Independence Act of 1947. It is true that this law was passed by the Labour Government,

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but even Mr. Churchill who has always been the enemy of India cannot think of repealing the Act as no purpose will be served by such an Act.

Q. 18. What are the Characteristics of a Sovereign Legislature? Compare them with those of a non-sovereign law-making body.

Ans. Characteristics of sovereign Legislature : Prof. Dicey has pointed out three characteristics of a sovereign lawmaking body:-

(1) there is no law which the sovereign Legislature cannot change. The Constitutional Laws are changed by the same body and in the same manner as the other ordinary laws. Thus, the British Parliament can pass a Bill for reforming the House of Commons or a Bill for abolishing the House of Lords. It is equally competent to pass a Bill which gives London a municipality or a Bill which makes valid marriages performed by a pretended clergyman. There is no special sanctity attached to the Constitutional or Fundamental Laws;

(2) there is no marked or clear distinction between laws which are not Fundamental or Constitutional and laws which are Fundamental or Constitutional. The Legislature acts both as an ordinary assembly and constituent assembly. That is not the case in U.S.A.;

(3) there does not exist any person or body of persons, executive, legislative or judicial, which can pronounce void any enactment passed by the British Parliament on the ground that it is opposed to the Constitution or on any other ground whatsoever. This means that the Courts have no right to declare any law *ultra vires* which is passed by Parliament. In this respect. U.S.A. differs from England.

Characteristic of a non-sovereign law-making body : According to Prof. Dicey, there are three characteristics of a subordinate law-making body. Those characteristics are the following:--

(1) The existence of the laws affecting its Constitution which body must obey and cannot change.

(2) The formation of a marked distinction between ordinary laws and fundamental laws.

(3) The existence of some person or persons, judicial or otherwise, having authority to pronounce upon the validity or constitutionality of laws passed by such law-making body.

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It is to be noted that the characteristics of a non-sovereign law-making body are quite opposite to those of a sovereign law-making body. Prof. Dicey has given certain examples of subordinate law-making bodies. The first example is that of a corporation. For example, and English Railway Company is in the strictest sense a law-making society. It can under the powers of its Act make laws for the regulation of travelling upon the railway and can impose a penalty for the breach of such laws which can be enforced by proceedings in the Courts. The legislative power of a corporation bears all the marks of subordination. The corporation is bound to obey laws and Act of Parliament which created it. The corporation cannot change the Act which created it. It is not a Constituent Assembly. The limits of its power are fixed by the Constitution of the corporation. Moreover the Courts have the right to pronounce upon the validity of the bye-laws of the company.

The next example is that of the English Colonies with a representative and responsible Government. In their cases also, those countries are becoming independent in the matter of legislation. But the Legislature of the British Colonies such as Southern Rhodesia are still subject to the limitations imposed by the Colonial Laws Validity Act, 1865.

Q. 19. Explain the sovereign and non-sovereign law-making bodies.

Ans. Characteristics of a sovereign : The characteristics of a non-sovereign Legislature are, obviously, the authorities of the characteristics of a sovereign Legislature. According to Dicey--

The characteristics of a sovereign Legislature as illustrated by the Parliament of England are three-fold, *viz.*:--

(1) The power of the Legislature to alter any law, fundamental or otherwise, as freely and in the same manner as other laws.

(2) The absence of any legal distinction between constitutional and other laws.

(3) The non-existence of any judicial or other authority having the right to nullify an Act of the Legislature, or to treat it as void or unconstitutional.

The characteristics of a non-sovereign law-making body : The characteristics of a non-sovereign law-making body, to the contrary, are----

(1) The existence of laws affecting its constitution which such body must obey and cannot change.

(2) The formation of a marked distinction between ordinary laws and fundamental laws.

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(3) The existence of some body, judicial or otherwise, having authority to pronounce upon the validity or constitutionality of laws passed by such law-making body. Whenever any of these marks of subordination exists with regard to a given law-making body, it shows that it is not a sovereign Legislature.

As example of non-sovereign Legislatures, we may mention the Legislatures of the British Colonies, such as Southern Rhodesia which are still subject to the limitations imposed by the Colonial Laws Validity Act, 1965.

Local authorities and Public Utility Corporations, having the power to make bye-laws within limits specified by statutes, are also subordinate or non-sovereign law-making bodies.

CHAPTER 4

CONVENTIONS

Q. 20. What do you understand by the Conventions of the English Constitution? What are they obeyed? Mention few important conventions of the English Constitution and discuss the real sanction behind them.

Ans. Conventions of English Constitution : The importance of the conventions in the English Constitution is so very great that the writers call the English Constitution as convention-ridden Constitution. As a matter of fact, conventions regulate the most fundamental aspect of the British administrative system. It is their existence which brings about a fundamental difference between the law of the Constitution and its actual working. For the same reason it is stated that in England nothing is what it seems, or seems what it is.

The conventions are the unwritten parts of the English Constitution. They are also called the Customs of the Constitution Conventions differ from law. While law is enacted by Legislature and enforced by the Courts, that is not so in the case of conventions. They are neither made by a Legislature nor enforced by the Courts. The very fact that a particular factor is regulated by conventions, shows that it cannot be brought before the Courts. That is beyond their jurisdiction. Moreover, law is static while conventions keep on growing just like the growth of the trees. The growth of conventions is slow and steady. It is not noticed. But the change goes on. But when a law is to be changed a formal enactment has to be passed. There is no gradual change. The change is abrupt.

Conventions differ from common law. While common law is enforced by the Courts, conventions do not enjoy that privilege. But in one thing, they resemble each other. Neither of them is enacted by the Legislature. While common law is the outcome of judicial

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decisions, conventions are based on the customs of the country.

The English Constitution has the following important conventions:--

(1) When the general elections are over, the King has to summon the leader of the majority party to form the ministry. The Prime Minister forms the ministry and he has a free hand in that matter. The Ministers are responsible to the British Parliament for whatever happens in their departments. They are also responsible to the House of Commons in their collective capacity for their general policy. The Ministers remain in office so long as they enjoy the confidence of the House of Commons.

(2) When a ministry is defeated in the House of Commons, it has two alternatives before it. It can resign forthwith and in that case, the leader of the Opposition will form the ministry. The other alternative is that the Prime Minister can go to the King and ask him to dissolve the House of Commons. The convention is that when the King is approached with such a request, he must oblige the Prime Minister and dissolve the House of Commons. If as a result of the new elections, the ministerial party secures a majority in the House of Commons, the old ministry goes on. If the ministry is defeated as was the case with Churchill in 1945, the ministry must resign without facing the House of Commons. The old Prime Minister cannot ask the King for a second dissolution.

(3) The Parliament must be called at least once a year. Not more than one year can pass without a Parliament which is the House of the people.

(4) The Prime Minister must belong to the House of Commons. The object of the convention is to emphasise importance of the House of Commons which is also the House of the people. That was not the convention before. There were Prime Ministers like Lord Salisbury, Lord Palmerston, Lord Norty, etc., who belonged to the House of Lords. But it is now realised that if democracy has any meaning, the Prime Minister must be there to take an effective part in them. His absence must be regretted. He must answer for what his colleagues do before the popular chamber. The result of this convention was that in 1922, Lord Curzon who was the leader of the Conservative Party at that time, was not allowed to form the ministry after the resignation of Lord George.

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(5) The election of the Speaker takes place on party lines. But once he is elected the Speaker of the House of Commons, he becomes non-party man. He stops attending the meetings of his party. He becomes a natural in party politics. His behaviour inside and outside the House is neutral. Although he is called the Speaker, he does not speak so that his statement may not be misrepresented. The result of this is that the Speaker is returned unopposed from his constituency as long as likes. He is also re-elected as Speaker as many times as he pleases. When he retires, he is given pension.

(6) When the House of Lords sits as the highest Court of Appeal for civil and criminal cases in England, it is only seven Law-Lords who participate in the discussion. There is no legal bar on other members of the House of Lords but the convention says that they must absent themselves from the meetings.

(7) When a Bill has been passed by both the Houses of Parliament, it is sent to the King for his signature. Legally, he may approve of it or not. But the convention lays down that the King will not use his veto power.

(8) Another convention is that when one member from one party has spoken in the House, the next Speaker must belong to the Opposition. The reason is that the minority must get an opportunity to express its views on the subject.

(9) The relations of the mother country with the Dominions are regulated by conventions. Some of the conventions were embodied in the Statute of Westminster in 1931, but many more conventions have grown after that.

Sanction behind conventions : The question is if conventions cannot be enforced by Courts what is the reason that they are obeyed? According to Prof. Dicey. conventions are obeyed because the breach of a convention ultimately leads to the breach of law for which there is punishment. Hence, the conventions have to be obeyed. He took the example of annual Parliaments. If Parliament was not called for more than a year, the budget will not be passed. Any attempt to collect taxes without the authority of Parliament will bring the tax-collectors into conflict with law. They may be arrested and put behind the bars. In the same way the Mutiny Act which is an annual Act, will lapse. In that case it will become difficult to manintain the army. Hence, Parliament has to be called at least once a year. The same is the case if the ministry does not resign after it has lost the confidence of the House.

But the critics point out that this explanation of Dicey is not true

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in the case of all the conventions. It is pointed out that no law is broken when the Speaker becomes a party man. The same is the case if the King decides to veto a Bill passed by Parliament. No law is violated if all the members of the House of Lords participate when the House sits as the highest Court of Appeal. There is no breach of law if the Prime Minister is taken from the House of Lords. As a matter of fact, many Prime Ministers did belong to that House.

It is pointed out by writers like Dr. Jennings, Dr. Ogg and Lowell that the real sanction behind the conventions is the force of public opinion. It is stated that conventions are like the rules of morality which are adhered to by the people on account of the fear of public opinion. Conventions are obeyed because the public opinion will not tolerate their violation. There will be a lot of hue and cry if the King were to veto a Bill passed by Parliament. The public will demand the taking away of the judicial functions from the House of Lords if all of its members were to insist on participating in the discussion when that House sat as the highest Court of Appeal for England. Likewise, the public opinion demands that the Prime Minister must belong to the House of Commons. The people insist that Parliament must be called regularly and scenic the convention of annual Parliaments.

Hence the real sanction behind the conventions, as in the case of ordinary laws also is the force of the public opinion.

CHAPTER 5

RULE OF LAW

Q. 21. What do you understand by the term "Rule of Law" as enunciated by Dicey?

Ans. Rule of Law : Lecturing on the English Constitution, Prof. Dicey declared in the 1880's that rule of law was one of the chief characteristics of the English Constitution. This means that in England, law is supreme. It is above everybody. There is the rule of law and not the arbitrary will of any individual.

According to Dicey, the rule of law embraces three "distinct, though kindred conceptions." In the first place, it implies that "no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in ordinary legal manner before the ordinary Courts." This means that no person can be punished in England unless he has been tried before a Court and found guilty of some breach of some definite law of the country. Unless and until that is proved, no person can be detained and an application for the writ of *habeas corpus* can be moved and the body of that person has to be produced in the Court. If the authority cannot prove that the person was arrested and detained according to some law of the country, he has to be released. So long as a person is found to be innocent, he cannot be tyrannised. An example of James

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I makes the meaning clear. When in 1603, the Londoners came out of the city to welcome their new King who was coming from Scotland, a pick-pocketer was caught red-handed and produced before the King for justice. In order to impress upon his subject the fact that he was a just King, James I ordered that man to be hanged without any trial. But it is stated that this act left a very bad impression on the minds of the Englishmen who hated the hanging of a person without proper trial. This principle protects the liberty of the Englishmen and leaves no place for the arbitrary will of the Government officials.

Secondly, the rule of law means that "no man is above law but that every man, whatever his rank or condition, is subject to ordinary law of the realm and amenable to the jurisdiction of ordinary tribunals. What is law---legal right and legal obligation for me---must hold equally as such for all citizens." This means that "every official from the Prime Minister to a constable or a collector of taxes is under the same responsibility for every act done without legal justification as any other citizen." This emphasises the fact that every man is equal in the eyes of law. No body can plead that he is not responsible for his actions. If the soldiers open fire on a crowd which is declared to be an unlawful assembly and kill some person while doing so, they are to be tried by the ordinary Courts. No favour is to be shown to them because of their status.

In the third place, rule of law means that " general principles of the Constitution are the result of judicial decisions determining the rights of private person in particular cases brought before the Courts." This refers to the liberties of the Englishmen. This emphasises the importance of the case-law.

The essence of the rule of law is that every person is to be tried according to the ordinary law, by the ordinary Courts. There is to be no punishment without trial and conviction of the accused. But the critics point out to the violations of the rule of law in England. Under the Public Authorities Protection Act of 1893, proceedings against the Government officials must be started within six months and if those proceedings fail, the plaintiff is to be punished heavily so that there may be no frivolous prosecution of Government servants. Although private institutions are responsible for the acts of their employees, the Government is not. The growth of administrative justice also is against the spirit of the rule of law.

Q. 22. On what grounds has Dicey's conception of rule of law been criticised?

Ans. Conception of rule of law : Prof. Dicey praised the principle of the rule of law as it prevailed in England. A critical examination of the three characteristics of the rule of law as pointed out by Dicey shows that the rule of law is not be found in England in the form in which he presented it. There were many violations in the

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rule of law even in the time of Dicey and in recent times the tendency is to deviate from the strict rule of law.

Criticism : The critics point out the following violations of the rule of law:--

(1) No proceeding, civil or criminal, is maintainable against the Crown in person : "As in the eyes of law no such wrong can be done, so in law, no right to redress can arise." The Maxim applies to personal as well as to political wrongs.

For a breach of contract or detention of property by the Crown, a remedy exists and that remedy is the Petition of Right. The procedure is regulated by the Petition of Rights Act, 1860. According to this, the subject petitions the Home Secretary for leave to sue the Crown. The King on his advice, either gives or withholds his fiat to bring the action. But it is not necessary that permission will always be given. In the case of *Leaman v. The King*, **(1962) 3 KB 663**; a soldier who filed a petition for arrears of pay at the rate agreed upon when he was enlisted, his petition was refused. In another case a Swedish Shipping Company got a guarantee from British legation at Stockholm in 1918 that in case a certain ship belonging to the company went to England, he would be allowed to return to Sweden and not to be detained in England. The ship came, but was not permitted to leave England. The Company was compelled to sell the ship and presented a petition claiming damages. The petition was rejected. It was observed: This was not a commercial contract. It was merely an expression of intention to act in a particular way in a certain event.... It is not competent for the Government to fetter its future executive actions which must necessarily be determined by the needs of the community when the question arises. It cannot by contract hamper its freedom of action in matters which concern the welfare of the State." **The Amphitrite v. The King; (1921) 3 KB 500.**

Apart from any special statutory provision, any contract of service under the Crown may be terminated by the Crown without any notice. Even if there is any express term, to the contrary, the crown will not be bound by it. A servant of the Crown holds office only during the Royal pleasure.

If a subject of the Crown sues a public authority, the Public Authorities Protection Act, 1893 demands that he must do so within six months of the injury inflicted. The official must be given an opportunity of tendering amends. If the suit does not succeed, the official is entitled to costs at a higher scale than the ordinary defendant.

According to the Crown Proceedings Act of 1947 which came into force from January, 1948, any individual may now sue a Government department in the same way as he is entitled to sue any

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other member of the community. This Act has abolished the immunity of the Crown in respect of torts committed by its servants. In such a case, the remedy is not by a petition of right but a regular action in the ordinary Courts. It is to be noted that the petition of rights is a matter of grace only.

(2) There cannot be judicial view of a traffic control.

(3) The Home Secretary has the right to open and detain letters.

(4) Under the orders of the Home Secretary, the persons suspected of murder are kept under repeated remand on a minor charge.

(5) Lord Chamberlain censors the plays. His ban no Court can remove.

(6) Judges enjoy absolute immunity as regards acts done by them in their judicial capacity. A Judge in vacation who unlawfully refuses to issue a writ of *habeas corpus* may be sued for a penalty of £500.

(7) Foreign States, their rulers and Diplomatic Agents enjoy a large measure of immunity before English Courts. They are completely immune in case of personal misconduct. No legal process can be issued against trading vessels belonging to foreign States.

(8) Under the Trade Unions Act, 1906, no action lies against a Trade Union or against its members or officials, in respect of any tort committed by or on behalf of the Trade Unions. This immunity is not confined to acts done in connection with trade disputes. It applies even to an action for libel. However, it is to be noted that the immunity of the Trade Unions is not available in cases under the provisions of Trade Disputes and Trade Unions Act, 1927.

(9) The Home Secretary has been given absolute discretion to grant or deny to aliens certificates of naturalisation as British subjects. He can revoke such certificates at his pleasure. He has also the power to deport any undesirable alien. His discretion cannot be questioned in any Courts of law.

(10) The crown alone has the right to issue passports to British subjects who want to travel in foreign countries. If the Crown refuses to issue a passport, its actions cannot be questioned in any Court of law.

(11) The traditional privileges of the Peers of England to be tried only by Peers has been abolished by the Law

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Reform Act of 1947.

(12) The Public Order Act, 1936, has endowed the police with authority to administer a kind of preventive justice by means of regulating or prohibiting, public meetings, processions, etc., and making, drilling and wearing of unauthorised uniforms illegal.

Q. 23. Explain the relation between the rule of law and the sovereignty of Parliament.

Ans. Relation between rule of law and sovereignty of Parliament : According to the Dicey, the sovereignty of the Parliament and the supremacy of the law of the country may appear to be opposed to each other, but that appearance is delusive. The fact is that the sovereignty of Parliament favours the supremacy of the law of the country.

Prof. Dicey has pointed out two characteristics or pecularities of English Parliament which are responsible for this result. The first characteristic is the command of Parliament can be uttered only through the combined action of the King, the House of Commons and the House of Lords. These commands must take the shape of formal and deliberate legislations. The will of the Parliament can be expressed only through an Act of Parliament. The result is that this characteristic prevents those invasions upon the law of the country which a despotic King, may have made by means of ordinances or decrees. As the Parliament speaks only through an Act of Parliament that greatly increases the authority of the Judges. A Bill which has been passed by Parliament becomes subject to judicial interpretation. The English Judges refuse to interpret law except by reference to the words of the law itself. The English Judges do not take any notice of the resolutions of either House of Parliament. They do not even consider the debates in Parliament. These things contribute to the authority of the Judges and the fixity of law.

The second peculiar characteristic of the British Parliament is that it has never, except at periods of revolution, exercised direct executive power or appointed the officials of the executive Government. The servants of the State are the Servants of the Crown. The Houses of Parliament do not directly appoint or dismiss the servants of the State. They do not issue any order to any military officer, or a constable or a tax collector. Parliament has never been able to use the powers of Government as a means of interfering with the regular course of law. It has looked with disfavour and jealous all exemptions of the officials from the ordinary liabilities of the citizens or from the jurisdiction of the ordinary Courts. The Judges in England cannot be removed except by a resolution of both Houses of Parliament.

It is to be noted that supremacy of the law necessitates the

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exercise of Parliamentary sovereignty. Whenever the executive in England needs any exceptional powers, it applies to the Parliament. It is the British Parliament which passed the Defence of the Realm Act, and the Emergency Powers Act. After the ending of every emergency, the executive gets passed from the Parliament what is known as an Act of Indemnity. It is by means of such an Act that the actions of the executive which were illegal at the time when they were committed, become legal and valid. It is for this reason that Dicey remarked that "if the sovereignty of Parliament gives the form, the supremacy of the law of the land determines the substance of our Constitution."

Q. 24. What are the two Leading Principles and four distinguishing Characteristics of "Droit Administrative?"

Ans. Two leading principles : While praising the rule of law of England and criticising the administrative law of France, Prof. Dicey has referred to two leading principles and the four distinguishing characteristic of the French administrative law. As regards the leading principles the first one is that the Government, and every servant of Government, possesses, as representative of the nation, a whole body of special rights, privileges or prerogatives as against private citizens and the extent of these rights, privileges, or prerogatives is to be determined on the principles different from the consideration which fix the legal rights and duties of one critizen towards another. An individual in his dealings with the State does not stand on anything like the same footing as that on which he stands in dealing with his neighbour.

The second leading principle is the necessity of maintaining the so-called separation of powers, or of preventing the Government, the Legislature and the Courts from encroaching upon one another's province.

Four distinguishing characteristics : Prof. Dicey has pointed out the following four distinguishing characteristics of the administrative law of France:--

(1) The relation of the Government and its officials towards private citizens must be regulated by a body of rules which are in reality laws, but which differ considerably from the laws which govern the relations of one private person to another.

(2) The ordinary judicial tribunals which determine the ordinary question, whether civil or criminal, between man and man, must have no concern whatever with matters at issue between a private person and the State. Such questions must be determined by administrative Courts in some way connected with the Government or the administration.

(3) If there is a conflict of jurisdiction between the ordinary

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Courts and the administrative Courts, the Court of Conflicts settles the questions. The Court of Conflicts has equal representation of the Council of State and the Court of Cessation. It is presided over by Minister of Justice.

(4) There is a tendency in administrative law to protect from the supervision or control of the ordinary law Courts any servant of the State who is guilty of an act however illegal, while acting in *a bona fide* obedience to the orders of his superiors and, as far as intention goes in the mere discharge of his official duties.

The law of France has recognized an indefinite number of acts of State which, as they concern the matters of high policy or public security or foreign policy, etc., must be left to the uncontrolled discretion of the Government and lie outside the jurisdiction of any Court whatever. According to Dicey during the Napoleonic era and far long afterwards, any transaction on the part of the Government or its servant was deemed to be an act of State which was carried out *bona fide* with the object of furthering the interest or the security of the country.

Q. 25. Compare Rule of law with Droit Administrative. The rule of law no doubt resources greater individual freedom than Droit Administratif, but the latter possesses certain advantages over the farmer. (Sarbadhikari). Discuss.

Ans. Comparison of Rule of Law and Droit Administratif : According to Dicey Droit Administratif creates a distinction between offences committed by officials and offences committed by ordinary individuals. The former are not cognizable by the ordinary Courts, but are triable by special Courts created for that purpose,--composed of officials in the service of the Government--

(*i*) Under Rule of Law, every mean is subject to the some law and the same tribunals.

(*ii*) The rights of the citizens, therefore, are liable to receive inadequate protection whenever political questions are involved. Under Rule of Law no political exigency can alter the indefeasible legal rights of the Individual.

(*iii*) While under Rule of Law the State is not liable to be sued, but the officials are personally answerable for wrongs committed in their official capacity under Droit Administratif the State is unable for wrongs of officials, and the fact that the injured party may obtain compensation from the State renders unreal the personal liability of the officials even in respect of those acts for which the officials are responsible to the Administrative Courts. In short, the State under Droit

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Administratif tries to shield the official which under Rule of Law it is the liability of the official which makes possible for existence of the immunity of the State.

On the other hand, all subsequent writers like Keith, Chalmers and Asquith, have expressed the opinion that Dicey failed to make a proper appreciation of the French system which ensures a complete legal protection to the citizen under an 'elaborate' scheme. Thus--

(*a*) In France, the administrative Courts have worked out new and effective remedies for various abuses which would appear to be hardly touched by the ordinary law of the land. They have assumed the power of annulling any act done or decree issued by any administrative authority in excess of the legal power given to such authority.

(*b*) Administrative law is no less real law than the ordinary law. The administrative Courts of France have developed a great mass of precedents, and it may be said that the Droit Administratif is as much a judge-made law as the ordinary Law of England.

(*c*) In certain respects, Droit Administratif is indeed more favourable to private rights than Rule of Law. For, under the former system, the theory of protection of the official as well as that of stability of the State enables the injured person to realise compensation from the State, while under the latter a decree against a public official (say a postman) of a heavy sum would mean nothing to the plaintiff for the official would never be able to pay it; at the same time the state could not be made to pay even a farthing of it.

(*d*) Under Rule of Law the Court cannot interfere unless some illegality has actually been committed, while under Droit Administratif the administrative Courts can check them beforehand.

(*e*) Above all, absolute Rule of Law, as Dicey formulated it no longer exists in England, in so far as the authority of administrative officials and Departments has widely been increased, while extensive and final *quasi*-judicial powers have been conferred on some of them by statute. It is true, there is no administrative Court for the trial of officials, but what is worse, "administrative law has been introduced in England without introducing administrative Courts."

For example, the decision of a Minister who refuses pension to some unfortunate decrepit is not questionable in the Courts of Law, by virtue of the Pensions Act which says that the Minister's decision

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under the Act shall be 'final'. There is a large variety of *ad hoc* tribunals which are not integrated into a definite system. Questions arising under a statute are often entrusted for determination of the tribunals.

Q. 26. What do you mean by "Act of State"?

Ans. Act of State : The words "act of State" are used loosely by constitutional lawyers. According to one definition it is an act which is done in exercise of sovereign powers but which does not injure anyone. According to another definition, it is an act of a foreign sovereign which though injuring a British subject, cannot give rise to a cause of action having been done within the territorial limits of the authority of that sovereign. According to another definition, it is an action of the British Government in the course of its transaction with a foreign State which injures a British subject. It is also defined as an act injurious to the person or property of some one who at that time is not a British subject, such act having been done by some representative of the British sovereign, whether civil or military, with the previous consent or subsequent ratification or adoption of the sovereign.

Sir F. Stephen defined an act of State as "an act injurious to the person or property of some person who is not at the time of that act a subject of Her Majesty which act is done by a representative of Her Majesty's authority, and is either sanctioned or subsequently ratified by Her Majesty", Thus, an act of State is an injury done against an alien outside the realm by a servant of the Crown. It is either previously authorised or subsequently ratified by the Crown on State policy. That injury is otherwise a wrong, but is not recognised by Courts of the country on State policy. An act of State is an arbitrary act which is done in the exercise of sovereign power and there is no remedy. The matter can be settled only by means of diplomatic representation. It is to be noted that no illegal act can be pleaded as an act of State as against a British subject in the United Kingdom: "As between the sovereign and his subject, there cannot be any act of State". In the case of *Wilkes*, it was observed that "the Constitution does not allow reasons of State to influence our judgment. God forbid it should". The result is that if a British subject suffers damage from any wrongful act done by a British officer, he has a remedy against that officer personally even if the act was authorised expressly by the Crown. The reason is that the warrant of no man, not even the King himself, can excuse the doing of an illegal act. Moreover, the defence of "act of State" is not available against a friendly alien, resident of British territory. Such was the decision given in the case of *Johnstone V. Pedlar*. It was held in that case that the defence of an act of State will not be valid in the case of seizure and detention of property found in possession of an alien, whose country is not at war with the Crown. The Crown must withdraw the protection which is due to every person

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irrespective of nationality before taking action.

There is a distinction between an act of State and a royal prerogative. A prerogative may affect questions between the King and the British subjects, but an act of State does not exist as between the King and the subjects. Moreover an act of State is an international matter, a question between a foreign sovereign and a British subject or sovereign, or between the British sovereign and a foreign alien. A prerogative, on the other hand, relates to the Crown's special privilege as affecting the subjects.

Some examples of acts of State may be given. The British Government may enter into a trade agreement with the French Government. During the war between Germany and the Britain a French ship having the goods of A, an Englishman was seized by the German Government. The British Government froze the goods and stocks of a German trader carrying on business in London during the war between the two countries.

In connection with this question, the readers are referred to the cases of *Buron v. Demman* and *Johnstone v. Pedlar* which are discussed at great length towards the end of this book.

CHAPTER 6

RIGHT TO PERSONAL FREEDOM

Q. 27. What do you understand by the Right to personal freedom?

Ans. Right to personal freedom : According to Prof. Dicey, the right to personal freedom means a person's right not to be subjected to imprisonment, arrest or other physical coercion in any manner that does not admit of legal justification. A person can be restrained in England only on two grounds. He must be accused of some offence and must be brought before the Courts to stand his trial. Or, he must have been duly convicted of some offence and must suffer punishment for it. In other words, no person in England can be arrested or imprisoned except in due course of law. English Constitutional Law has provided two methods for enforcing the right of personal freedom. Those are the redress for unlawful arrest or imprisonment by means of a prosecution or an action, and deliverance from unlawful imprisonment by means of a writ of *habeas corpus*.

Redress for arrest or imprisonment : A person who has been wrongfully arrested or imprisoned, can get his redress either by getting the wrong-doer punished or by getting compensation for the damage inflicted upon him by the wrong. Each of these forms of redress is open to the aggrieved party. If A assaults B without

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justification, B has two legal remedies. He can have A convicted of an assault, or he can bring an action for trespass against A and get compensation for the damage sustained by him. An action for trespass can and has been brought against Governors of Colonies, Secretaries of State, officers who have been tried by Court Martial, persons not subject to military law, and against every kind of high or low officials. Every wrong-doer in England is individually responsible for every unlawful act in which he takes part. He cannot plead in his defence that he did the wrongful act under the orders of master or superior. Moreover, the Courts of England give a remedy for the infringement of a right whether the injury done is great or small.

Q. 28. Explain the nature and operation of the writ of habeas corpus.

Ans. Writ of Habeas Corpus : The writ of *habeas corpus* is an order issued by the Court calling upon the person, who has illegally detained another, whether in person or in private custody, to "have the body" of that other before the Court, in order to let the Court know on what ground the latter has been confined, and thus to give the Court an opportunity of dealing with him as the law may require. '*Habeas Corpus*' literally means to 'have his body'. By the writ of *habeas corpus* the Court can cause any person who is imprisoned to be brought before the Court and obtain knowledge of the reason why he is imprisoned; and then either set him free then and there, or see that he is brought speedily to trial.

The writ of *habeas corpus* is one of immemorial antiquity and is called a prerogative writ, being based on the King's prerogative to inquire into the cause of the imprisonment of any of his subjects. As in many other cases, the *prerogative* of the King has now come to be the *right* of the subject. Thus the writ is not discretionary, but is granted 'as a matter of right; the Court must issue it if *prima facie* ground is shown for supposing that the person on whose behalf it is asked for is unlawfully deprived of his liberty. The writ may be addressed to any person whatever--an official or a private person--who has another in his custody; and disobedience to the writ is met with punishment for contempt of Court, or with heavy penalties to be paid to the aggrieved person. The writ of *habeas corpus* is thus a very powerful safeguard of the subject against arbitrary acts not only of private individuals but also of the Executive.

But though the writ is based on Common Law, it has been confirmed and regulated by Statute. The Habeas Copus Act of 1679 applies where a person has been imprisoned in a goal on a charge of *crime*, while the Act of 1816 applies to cases of *civil* detention.

Q. 29. (1) What is the modern practice as to the writ of habeas corpus? (2) What are consequences of the issue of a writ of habeas corpus? (3) In what manner does the writ of habeas

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corpus secure individual liberty in England?

Ans. (1) Practice as to writ : The writ of *habeas corpus* is issued on the application either--

(*i*) of the prisoner himself, or

(*ii*) of any person on his behalf, or

(*iii*) of any person who believes him to be unlawfully imprisoned.

The practice is to move through counsel the King's Bench Division of the High Court or during vacation, to apply by summons to a King's Bench Division judge sitting in chambers.

(2) Issue of unit : When the writ is issued, the person detaining the prisoner must, on pain of penalty, produce the prisoner before the Court. When the prisoner is produced, the judge may--

(*i*) make no order at all, or

(*ii*) discharge the prisoner, or

(*iii*) award bail. Now, the cause of detention may be either criminal or civil.

When the person has been imprisoned on a charge of crime : If there is *no legal warrant* for his imprisonment, the judge will set him at liberty. But if there is a *legal warrant*, his position differs according to the nature of the offence with which he has been charged--

(*a*) in the case of the lighter offences, he has a right to be admitted on bail.

(*b*) But in the case of the more serious offences, such as a treason or felony, the prisoner is not entitled to bail. All that he can claim is the right to a speedy trial.

Consequently, if he so requires, the judge will in this case order him to be tried at the next Sessions, and if not so tried, to be admitted to bail or discharged.

(3) When the person has been detained not on Charge of crime : The judge will order an immediate release if he has by law a right to liberty.

In fine, the effect of the issue of a writ of *habeas corpus* is that no man can be kept in confinement except under authority of the law.

Q. 30. Explain the statement that the Habeas Corpus Act. 1679, "introduced no new principle nor conferred any right upon the subject. "What were the chief provisions of that Act?

Ans. Habeas Corpus Act, 1679 : The right to the writ of *habeas corpus* existed at common law long before the passing of the

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Habeas Corpus Act of 1679. Cases occurred, however, where the writ was evaded under various pleas and excuses, *e.g.*, by pleading the King's command in justification of imprisonment [*e.f. Darnal's Case*], or proving change of prison as an excuse for non-production of the prisoner [*of Jenk's Case*]. The aim of the Act was to meet these devices by which the writ was evaded. But the right to the writ was not in any way made dependent on the Act. The Act defined no substantial principle or right, but simply aimed at improving the *legal mechanism* by means of which the acknowledged right to personal freedom was enforced.

The Act of 1679 applied only to cases of persons imprisoned on a charge of crime; but it---

(*i*) made the granting of the writ *compulsory* in the case of a person imprisoned without legal cause being assigned in the warrant of committal;

(*ii*) provided for the speedy trial of persons imprisoned for treason or felony, or alternatively allowed bail; and

(*iii*) made the sending of a prisoner out of the Kingdom an offence.

Q. 31. Write a critical note on Acts of Indemnity.

Ans. Acts of indemnity : An Act of indemnity is a piece of legislation which frees the persons who have broken the law from responsibility for its breach, and thus makes lawful those acts which were unlawful at the time they were committed. There is intimate connection between a Habeas Corpus Suspension Act and an Act of Indemnity. A Suspension Act does not absolve any person from civil or criminal liability for a law. All that it does is that a person who has been imprisoned, cannot secure his freedom by claiming a writ of *habeas corpus* so long as the Suspension Act lasts. The result is that as soon as the Suspension Act is finished; there is every likelihood of the aggrieved parties to take action against the Government servants who were responsible for their wrongful imprisonment.

Prof. Dicey has a given few illustrations. A Secretary of State or a subordinate may arrest and imprison a perfectly innocent man without any cause whatever. The arrest may be based on the belief that it is conducive to the public safety that a particular person should be kept in prison and deprived of his influence at the time of a particular crisis. The arrest may involve the unlawful breaking into a private dwelling house, The destruction of private property, etc. In all these cases, the Secretary of State who orders the arrest and the officials who carry out his commands have broken the law. They may have acted under *bona fide* belief that their conduct was justified by the necessity of providing for the maintenance of order. But this will not of itself free the person carrying out the arrests from criminal and civil liability for their unlawful acts. The result is that as soon as the

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Suspension Act ceases to operate and imprisoned person is set free, he can bring an action against the Government servant. Thus, a Suspension Act would fail of its main objects unless the official feels assured that as long as their act is *bona fide* and uninfluenced by malice and corrupt motives, they would be protected from penalties for conduct which was nothing more than the free exertion for the public goods of that discretionary power which the Suspension Act gave the executive. Consequently before the Suspension Act ceases to operate. Parliament passes an Act of Indemnity, protecting all persons who have acted under the powers given to the Government by law. During the reign of George III, the Habeas Corpus Act was suspended from 1794 to 1801. To protect that Government servant, an Act of Indemnity was passed in 1801 "indemnifying such person as since the first day of February, 1793, have acted in apprehending, imprisoning, or detaining in custody in Britain of persons suspected of high treason or treasonable practices".

It is true that every Suspension Act is followed by an Act of Indemnity and it is possible that the executive might act arbitrarily in expectation of an Act of Indemnity. But it cannot be denied that the relief which the public servants can hope to get is prospective and uncertain. If the public servants abuse their powers and there is a strong agitation among the people against the same, it may become impossible for the Government to pass an Act of Indemnity through the Parliament. Moreover, the nature of the protection to be got by Government servants depends upon the terms of the Act of Indemnity. Those terms may be narrow or wide. The Act of Indemnity of 1801 gave a very limited amount of protection to the official wrongdoers. Reckless cruelty to a political prisoner or the execution of a political prisoner between 1793 and 1801 left every man concerned in the crime liable to suffer punishment in spite of the Act of Indemnity.

CHAPTER 7
FREEDOM OF DISCUSSION

Q. 32. In what sense is the press in England free? What is the constitutional basis of this freedom? "In truth there is little in the Statute book of England which can be called a Press Law". Discuss.

Ans. Press in England : Liberty of the Press in England does not mean that the law of England is in any way specially favourable to the publication of printed matter. In fact, it does not recognise, in general, any special privilege on behalf of the 'press', if by that term we mean in conformity with ordinary language, periodical literature in general and particularly the newspapers. The press is subject to the general law of the land just as a private individual is. As Diecy puts it,--

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"The simplest way of setting forth broadly the position of writers in the press is to say that they stand in substantially the same position as letter-writers. A man who scribbles blasphemy on a 'gate and a man who prints blasphemy in a paper or in a book commit exactly the same offence, and are dealt with in England on the same principles".

What, then, is meant by saying that in England the press is free? It means that there is an England, a complete freedom, unrestricted by any system of licence or press censorship, to write and publish anything one likes, so long as he does not break the law of libel, sedition, blasphemy, or obscenity. Lord Manfields thus observes: 'The liberty of the press consists in printing without any previous licence, subject to the consequences of law". Liberty of the press, indeed, is a mere application of the general principle, that no man is punishable except for a distinct breach of the law.

Nevertheless, the liberty of the press has long been reputed as a special feature of English institutions, and that not without foundation. The statement that the press is subject only to the ordinary law of the land may sound commonplace enough, but from this follow two corollaries which constitute the peculiar virtue of the English law as distinguished from that of many foreign countries. These are--

(1) *Firstly*, in England there is no provision of law requiring previous licence or preliminary deposit for the publication of any printed matter (barring the single exception with regard to the licensing of plays). Nor is there any such thing as censorship of the press or of political newspapers.

(2) *Secondly*, offences committed through newspapers, which are technically called 'press offences', are dealt with by the ordinary Courts of the country, *i.e.*, by a judge and a jury and not by any special tribunal.

Q. 33. What are the limits to the liberty of speech in England? What is seditious libel?

Ans. Limits to the liability of speech : No man is entitled to publish a statement which is (1) defamatory, (2) seditious, (3) blasphemous, or (4) obscene.

(1) Defamation : Defamation consists in publishing an untrue statement about another which is calculated to injure him in his trade, or to hold him up to ridicule, hatred, or contempt. When the defamatory statement is made in writing or in some other permanent form, it is called libel; and when made orally, it is slander. Slander is a civil wrong which makes the author of the statement liable in damages to the person defamed; libel is a civil wrong as well as a criminal offence, if calculated to bring about a breach of the peace.

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(2) Seditions : Sedition consists in the attempt (*a*) to bring into hatred or contempt, or to excite disaffection against, the Sovereign, or the Government and constitution of the United Kingdom as by law established, or either House of Parliament, or (*b*) to excite British subjects to attempt otherwise than by lawful means the alteration of any matter in Church or State, or (*c*) to raise discontent or disaffection amongst. His Majesty's subject, or (*d*) to promote feeling of ill-will and hostility between different classes. Any statement made and published with a seditious intention is punishable as a misdemeanour, and is called seditious libel.

(3) Blasphemous : Blasphemy is the speaking, or writing and publishing of profane words relating to God, Jesus Christ, the Bible, or the Book of Common Prayer, intended o wound the feelings of mankind, or to excite contempt and hatred against the Church. Blasphemy is a misdemeanour.

(4) Obscenity : Obscenity is the misdemeanour of publishing obscene books, pictures, effigies, etc., which have a tendency to deprave and corrupt those whose minds are open to immoral influence.

CHAPTER 8
RIGHT OF PUBLIC MEETING

Q. 34. Explain the nature of the right of public meeting in England.

Ans. Right of public meeting : According to Dicey, it can hardly be said that the English Constitution knows of such a thing as any specific right of public meeting. This right affords the most remarkable illustration of the statement that in England, the Constitution is based on individual rights. The right of assembling is nothing more than a result of the view taken by the Courts as to the individual liberty of the person and individual liberty of speech. There is no special law allowing A, B and C to meet together either in the open air or elsewhere for a lawful purpose, but the right of A to go where he pleases so that he does not commit a trespass, and to says what he likes to B so that his talk is not libellous or seditious. The same can be said about others and if such a thing happens, there arises the right of public meetings.

According to Dicey, a meeting which is not otherwise illegal, does not become an unlawful assembly merely because it will excite violence and unlawful oppositions, and thus may indirectly lead to a breach of peace. "A's rights to do a lawful act, namely, walk down the High Street, cannot be diminished by X's threat to do an unlawful act, namely to knock down A. In the case of *Beauty v. Gillunis*, the Salvation Army met at a place with the knowledge that they would be

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opposed by the Skeleton Army. The Magistrate put up a notice forbidding the meeting. The members of the Salvation Army met in spite of notice. One of the members refused to obey and he was arrested. He was convicted along with others for having taken part in an unlawful assembly. It was admitted that the meeting of the Salvation Army was likely to lead to an attack by the Skeleton Army and there was every danger of the breach of peace. An appeal was taken against the conviction and the appellate Court quashed conviction.

Fleld, J. observed thus : "What has happened is that an unlawful organisation has assumed to itself the right to prevent the appellants and others from lawfully assembling together, and the finding of the justice amounts to this, that a man may be convicted for doing lawful act if he knows that this doing it may cause another to do an unlawful act. There is no authority for such a proposition."

According to Holmes, the principle underlying the decision is that an act innocent in itself, done with innocent intent, and reasonably incidental to the performance of a duty, to the carrying on of business to the enjoyment of legitimate recreation, or generally to the exercise of a legal right, does not become criminal because it may provoke persons to break the peace, or otherwise to conduct themselves in an illegal manner.

Generally speaking an otherwise lawful public meeting cannot be forbidden or broken up by the Magistrates simply because the meeting may probably or naturally lead to a breach of peace on the part of wrong-doers.

Q. 35. State the limitations, if any, upon the right of public meetings in England.

Ans. Limitations upon the right of public meetings : Prof. Dicey has pointed out two limitations or exceptions to the right of public meetings and both of them are meant for the purpose of preserving the peace of the King:

(1) If there is anything unlawful in the conduct of persons conventing or addressing a meeting and the illegality is of a kind which naturally provokes opponents to a breach of the peace, the speakers at and the members of the meeting may be held to cause the breach of the peace, and the meeting itself may thus become an unlawful meeting.

If a Protestant controversialist surrounded by Roman Catholic population, uses abusive language which is against the Catholics or which he is forbidden to do by a local bye-law, and thereby provokes the Catholics to break peace, the meeting may become an unlawful assembly. The same is the case where the object of the meeting is not strictly lawful and is likely to excite opponents to a breach of peace.

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(2) Where the public meeting is strictly lawful but the meeting provokes a breach of peace which is impossible to preserve or restore by any other means than by dispersing the meeting. In such a case, the Magistrates, constables, and other persons in authority can call upon the meeting to disperse, and if it does not do so, the meeting becomes an unlawful assembly.

For example, if the Salvation Army holds a meeting and the Skeleton Army is determined to stop them from meeting, and it is impossible to maintain peace except by dispersing the meeting, the meeting becomes unlawful if it does not disperse even when it is asked to disperse by a Magistrate. But it is to be noted that the only justification for preventing the Salvationists from exercising their legal right is the necessity of the case. If peace can be preserved not by breaking the meeting, but by arresting the wrong-doers, the Magistrates, or constables, are bound to arrest the wrong-doers, and proceed the Salvationists in the exercise of their lawful rights.

A zealous Protestant lady walks through a crowd of Roman Catholics wearing a party emblem, namely, an orange lily, which under the circumstances of the case is certain to excite and does excite, the anger of the mob. The riot begins. X, a constable who has no other means of protecting the lady or of restoring the peace, requests her to remove the lily. She refuses to do so. The constable remove the flower and restores the peace. Under these circumstances, the conduct of the constable is apparently legal, and the lady has no ground of action for what would otherwise have been an assault. The legal vindication of the conduct of the constable is not that the lady is a wrong doer, or that rioters were within their right, but that the peace of the King could not be restored without compelling the lady to remove the lily.

Prof. Dicey has given another example. Suppose the Salvationists advertise throughout the town that they intend to hold a meeting in a field near Oxford, that they intend to assemble in Saint Giles' and march from there with banners flying and bands playing to heir proposed place of worship. Suppose the Home Secretary thinks that it is undesirable that the meeting should take place, and serves formal notice upon every member of the Army or the organisers of the meeting. This notice does not alter the character of the meeting. But if the meeting is otherwise illegal, the notice makes any one who reads it aware of the character of the assembly and affects his responsibility for attending it. The Government has little or no power of preventing meeting which to all appearance is lawful, even though they may in fact turn out when actually convened to be unlawful because of the mode in which they are conducting.

A meeting may be lawful which nevertheless any wise or public spirited person would hesitate to convene. Suppose a Protestant

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zealot were to convene a meeting for the purpose of denouncing the evils of the confessional, and were to choose some public place in the midst of a large town filled with a population of Roman Catholic poor, the meeting would be lawful, although it might provoke violence on the part of the opponents. Neither the Government nor the Magistrate could, as a rule at any rate, prohibit and prevent the meeting from taking place. The meeting can be stopped only if the Protestant zealot uses abusive language and it is impossible to maintain the peace with preventing the meeting. But neither the Government not the Magistrate can solely on the ground that a public meeting may provoke the wrong-doers to a breach of the peace prevent loyal citizens from meeting together peaceably and for a lawful purpose.

A limitation of a different nature has been laid down in the case of *Wise v. Dunning*. Even if there is nothing unlawful in the meeting, the leader or any particular member of the meeting may be restrained from holding the meeting if there is likelihood of the breach of the peace in consequence thereof.

CHAPTER 9

MARTIAL LAW

Q. 36. What do you mean by Martial Law?

Ans. Martial Law : Martial Law in the strict sense of the term is opposed to the system of Rule of Law, the essence of which is that no man can be punished or imprisoned, except for a breach of the law proved in the ordinary legal manner before the ordinary Court of Law.

The term Martial Law, however, is loosely employed to denote a number of quite distinct things--

(1) It is sometimes used to denote the law administered by Court-martial for the purpose of maintaining discipline within the army. The law thus administered applies to soldiers only and is, therefore, more properly called Military Law.

(2) The law administered by a military commander in occupied enemy territory in time of War. This strictly speaking, falls outside the Province of Constitutional Law, and lies within that of international law and custom.

(3) It is used to denote the suspension of the ordinary law and the substitution for it of discretionary Government by the executive exercised through the military. This is the strict sense of the term, and it corresponds to the state of affairs known in Continental countries as a "state of siege" or "the suspension of the constitutional guarantees." When martial law in this sense is declared, ordinary citizens are left at the mercy of the Courts-martial, and have no redress in the ordinary Courts, against the arbitrary acts of the executive. According to the

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generally accepted view martial law in this sense is unknown to the English Constitution.

(4) It is used to denote the common law right and duty to maintain public order by the exercise of any necessary decree of force in time of invasion, rebellion, riot or insurrection. The right and obligation apply not only to the Executive, but to every citizen. Martial Law in the present sense differs from Martial Law in the strict sense in three important respects :

(*a*) It need not be "proclaimed".

(*b*) the amount of force justified by it is strictly limited to the necessities of the case.

(*c*) A party aggrieved by reason of any such act can have recourse to the ordinary Courts. It is in this sense only that Martial Law may be said to be recognised in England.

Q. 37. Distinguish between Martial Law and Military Law.

Ans. Distinction between Martial Law and Military Law : Although the terms "Martial Law" and "Military Law" are every often used one for the other, the following are the points of distinction between the two:--

(1) The Military Law is embodied in the Army Act, Army Orders and the Regulations of the King. It is a Code which governs the soldiers only. The offences under it are known as the military offences. The military offences are tried before a Courts-Martial. Martial Law impose on the soldiers additional liabilities. They are subject to the jurisdiction of the Courts-Martial and the ordinary Courts. The former tries them for military offences and the latter for violation of the ordinary laws of the country.

(2) While the Military Law applies to the soldiers only, Martial Law applies both to the soldiers and the civilians in times of war, rebellion or insurrection. It is the general law of the abnormal times and is applicable to all. The object of Martial Law is to maintain peace in a time of emergency. The Government is authorised to use as much of force as is necessary to maintain peace. That power may be legal or arbitrary.

(3) Martial Law is a law of the abnormal times. It is a temporary law. Its existence has to be justified by the necessities of the times. This can be promulgated only in times of war, rebellion or insurrection. On the other hand, Military Law is a permanent law. It applies to the soldiers both in times of Peace and War.

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(4) Martial Law is based on Common Law. It may be proclaimed by a Law of Parliament, but in that case it will be put on the same footing as the ordinary law of the country. Military Law on the other hand, is embodied in a Law of Parliament. If is to be found in the Army Act, 1881, the King's Regulations and the Army Orders.

Q. 38. What is the nature of Martial Law in England?

Ans. Nature of Martial Law in England : According to Dicey, "Martial Law in the proper sense of the term in which it means the suspension of ordinary laws and the temporary Government of a country or parts of it by military tribunals is unknown to the law of England." During the reign of Charles I, it was laid down by the Petition of Right in 1628 that "commissions should not be issued to try persons according to Martial Law, as is used by armies in times of war." It is presumed that since 1628, the Government has no right to declare Martial Law in times of peace.

To quote Dicey again "If by Martial Law be meant the power of the Government or loyal citizens to maintain public order, at whatever cost of blood or property may be necessary, Martial Law is assuredly a part of law of England," This means the right of Crown and its servants to meet force by force in the case of invasion, insurrection, riot or any violent resistance to the law. In such a case, it is the duty of every civilian or soldier to use all his powers to maintain the peace of the King. It was held in the case of *Rex v. Pinney* that it was the duty of every citizen to help the Government to meet any invasion and crush a riot. The person who fails to be so, commits a criminal offence for which he can be punished. Martial Law in this sense differs from Martial Law in the strict sense in three ways. It need not be proclaimed. The amount of force justified by it is strictly limited to the necessity of the case. A party aggrieved by reason of any such act can have the help of the ordinary law Courts. It is to be noted that it is only in this sense that Martial Law can be said to exist in England.

It is pointed out the Martial Law can be declared in times of war by the Crown by virtue of his prerogative, although it cannot be so declared in time of peace as laid down by the Petition of Right. But the view of Dicy is that Martial Law cannot be declared even in times of war by the exercise of the prerogative. It is pointed out that the prerogative to proclaim Martial Law in times of war has not been exercised since 1628. When Martial Law was proclaimed in Jamaica in 1865 and in Ireland in 1899 and 1920, it was done not by the exercise of the prerogative, but by an act of Parliament. Moreover, the protection which the militarymen have against unlawful acts done by them during the war, is not given by the prerogative but by an Act of Indemnity. "It is difficult to see why Acts of Indemnity should all be needed if the actions which they retrospectively legalise were legal all the times by virtue of the Proclamation." Moreover, during the Second

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World War, the Government did not proclaim Martial Law by means of prerogative right. It also did not order the trial of the civilians by military tribunals. What was actually done was that Parliament passed the Emergency Powers Act, 1940. It was this Act of the Parliament which authorised the creation of special war zone Courts to act in place of the ordinary Courts when the invasion actually took place. Such a provision would not have been made if the right to declare Martial Law in times of war vested in the Crown.

CHAPTER 10

EXECUTIVE

Q. 39. What is the position of the King in the English Constitution?

Ans. Position of King in English Constitution : Legally speaking, the English King today has the same power as the Norman Kings had. Most of the things are done in his name. Technically, the whole of the administration of England is carried on in the name of the King, but the growth of the Cabinet system in England has in actual practice transferred all the powers into the hands of the Ministers who are elected by the people and are responsible to the people through Parliament. Since England has a Parliamentary Government, all powers must be in the hands of those who are responsible for them. Since the King cannot be made responsible to anybody he cannot, under Parliamentary Government, exercise any authority. No wonder, the English King has been described as a rubber stamp or figure-head or a signing machine.

It is true that in a Parliamentary form of Government, the English King cannot exercise any discretionary power without consulting his Ministers. But this does not mean that the English King has absolutely no influence on the administration of the country. Experience has shown that the King has positive influence if not control over the administration. Bagehot says that the English King has three kinds of power:

(1) The King has the right to be consulted. Whenever there is any important matter under discussion before the Cabinet the advice of the King is usually sought. That advice carries a great weight with the Cabinet. The reason is not far to seek. While the Ministers keep on changing very often, the king goes on. The result is that the practical experience and the knowledge of the King regarding administration is much greater than that of any Minister. Thus, Queen Vectorial ruled from 1837 to 1901. On account of her long reign, she could be expected to know more about administration than other Ministers. Her 64 years of rule helped her to know more about the

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intricacies of various problems of the country and also their historical background than any Minister. No wonder great weight was attached to her opinions. Moreover the King belongs to no party. His advice is expected to be impartial. Sitting in the palace, the King studies the situation of the country and is expected to speak out his mind without any fear of his being turned out. Hence, it is clear that the right to advise has great potentialities and hence through this right, the English King does exercise a lot of influence on the administration of the country.

(2) The English King has the right to warn the Ministers. If the feels that a particular thing which is being done or is going to be done by the Ministers is not in the interests of the country, he can warn the Ministers who have to listen to the warning and as far as possible act accordingly. Thus, in 1931 when the great economic crisis occurred, the English King asked the Labour Government to set up a National Government. It is well-known that Ramsay Macdonald agreed to form a National Government without even consulting the other members of his party. It is also to be noted that although the number of his followers was very small as compared with those of Baldwin, Ramsay Macdonal continued to be Prime Minister from 1931 to 1935.

(3) The English King has the power to encourage. This means that if the King approves of the policy followed by his Ministers, he encourages them to go ahead with the same. This encouragement must have a healthy influence on the work of Ministers.

In addition to the above powers, the English King influences foreign policy of the country. The King can have direct contacts with the Governments of the other countries. The personal element is very important. Thus, it was the visit of Edward VII to France in 1903 that brought England and France together in 1904 and ultimately made England fight with France against Germany in 1914. Again it was the visit of George VI in early 1939 that brought England and France together in World War II. It was the visit of English King to Canada and U.S.A. in July, 1938 that brought these countries together and helped U.S.A. and Canada to enter the war on the side of England.

Thus, it is clear that although the English King is a constitutional ruler, he can and does exercise a lot of influence on the Government of the country. In spite of democracy in England, the English King is immensely popular and this helps him to exercise the influence which he does.

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Q. 40. Discuss the functions of the Crown in England today.

Ans. Functions of the Crown : The present-day functions of the Crown in England may thus be summarised under three heads; (*a*) non-political; (*b*) political; (*c*) formal.

(*a*) The non-political functions relate to the social and ceremonial position of the Crown as the pivot of the dignified part of the Constitution, and appealing to the sentiments of the Crown as the emblem of national unity.

(*b*) The political functions depend more or less upon the personal character of the reigning Monarch. But above all, the Crown serves as the guardian of the 'invisible Constitution.'

As Gladstone observed:

"The acts, the wishes, the example of the Sovereign in this country are a real power. An immense reverence and tender affection await upon the person of the one permanent and ever faithful guardian of the fundamental conditions of the Constitution".

The Crown also acts a disguise in so far as it "enables the real rulers to change without heedless people knowing it".

(*c*) Of the formal prerogatives of the Crown may be mentioned, (*i*) the right of dissolution of Parliament and the right to refuse it; (*ii*) the right to select the Prime Minister, in the exercise of these two powers, the Crown still possesses the right to exercise his personal judgment.

As the Head of the State, thus,--

"the Crown represent the sum totals of Governmental powers and is synonymous with the Executive. In the exercise of some of these powers the King may be called upon to exercise a personal decision, others are exercised by the King on the sole responsibility of Ministers; in the exercise of others the King plays no Part, for the majority of statutory powers are conferred upon Ministers as such and are exercised by them in their official capacity, though they are nonetheless exercised on behalf of the Crown". (*Wade & Phillips*).

Q. 41. What do you understand by the prerogative of the Crown?

Ans. Prerogative of the Crown : According to Prof. Dicey, prerogatives of the Crown are "nothing else than the residue of discretionary and arbitrary authority which at times is legally left in the hands of the Crown." According to Blackstone, prerogative is "that pre-eminence which the King hath over and above all other persons, by virtue of the Common Law, but out of its ordinary course, in right of his royal dignity". According to Coke, C. J., prerogative includes all

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those "Powers pre-eminence and privileges which the law giveth to the Crown." Prerogatives may be defined as the Common Law discretionary powers of the King.

There is a distinction between the prerogatives of the Crown and the acts of the State. The prerogative may affect questions between the King and the British subjects, but an act of the State does not exist between the King and his subjects. An act of State is more an international matter. It is a question between a foreign sovereign and a British subject or sovereign, between the British sovereign and a foreign alien. A prerogative, on the other hand, relates to the Crown's special privileges as affecting the subjects. An act of State is based on State policy and municipal Courts have no jurisdiction in respect of an act of State which is not done under the colour of any municipal law. A prerogative has nothing to do with State necessity. The Courts have the power to determine whether any prerogative exists or not. The Ministers are responsible to Parliament for the proper exercise of the prerogative power. The King cannot authorise any person to commit an unlawful act by the exercise of his prerogative.

Examples of the prerogatives of the Crown : It is desirable to give a few examples of the prerogatives of the Crown:-

(1) The Prime Minister is selected by the King and the Prime Minister is the leader of the party which commands a majority in the House of Commons. The Prime Minister advises the King as to the appointment of the other Ministers who are appointed by the King. The Ministers can be dismissed by the King although the command a majority in the House of Commons;

(2) The Heads of the Departments of the Government are appointed by the King and the same is the case with the other important dignitaries in the Church and the State. A King is the executive head. Though in the name of the King, the appointments are really made by the Crown because it is through the Ministers appointed by him that the King exercises his functions;

(3) The King summons Parliament by a Royal Proclamation. It is he who prorogues Parliament. It is the King who dissolves Parliament. But there is a convention that the King will not dissolve Parliament unless he is advised to do so by the Ministry in Power;

(4) The King can do no wrong. Not only the King can do no wrong, he cannot think of any wrong. When by misinformation or inadvertence he invades the rights of the subjects, the law declares that the King has been deceived and his act is void;

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(5) The King never dies. The King has the attribute of immortality. As soon as one King dies, he is succeeded by another. There is no interval. The sovereign always exists and it is only the person who changes;

(6) The King is God's minister on earth;

(7) Time does not run against the King. But there are certain exceptions to this rule. The right of the Crown to claim real property as against the adverse right of the subject is barred after 15 years. Similarly, there are many instances where criminal proceedings must be started within a specific time;

(8) When the rights of the King and the subjects conflict, the right of the latter must give way to the former. Where the King and the subjects are joint owners, the King takes the whole;

(9) The King is never an infant. Royal grants and statutes assented to by an infant King are valid. The law considers the King always capable of transacting business;

(10) The King has the right to create as many peers as he likes. But this power is exercised by him on the advice of the Ministers;

(11) The King alone can create and confer dignities and honours;

(12) The King has power to legislate for conquered and *ceded colonies* until he grants a Constitution;

(13) The King is the sole representative of the nation in international dealings. It is his prerogative to make treaties, to cede territory, to make war and peace, to recognise the status of a foreign country or its Government, to appoint representatives of his own country abroad and to receive the representatives of other States at his Court.

It is to be noted that many of the prerogatives of the Crown have been taken away by the statutes of Parliament. It was sometimes argued that Parliament could not touch the prerogative of the Crown but that position has now been given up. the Parliament has the right and power to restrict and regulate the prerogatives of the Crown. Moreover, if a law is made of the subject which was previously regulated by the prerogative, the law of the Parliament is to be enforced in future. The prerogative is merged in the statute of Parliament by implication. In the case of *Attorney-General v. De Keysers Royal Hotel*, both the Court of Appeal and the House of Lords rejected the argument of the Crown that as the Crown had

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prerogative rights, the Crown could act under the prerogative. It was held that the statute conferring the same right abridged royal prerogative. Moreover, a certain prerogative may be lost simply because it is not exercised for a long time.

It may also be noted that the prerogatives of the Crown have become the privileges of the people because they are exercised by the King on the advice of the Ministers for the good of the people.

Q. 42. Distinguish between Royal Prerogative and Act of State.

Ans. Difference between Royal Prerogative and Act of State : While an Act of State is an act done by the sovereign or by his agents towards a person other than a British subject--the Prerogative indicates the power and authority of the Crown in relation to his own subjects.

But while an Act of State is based on State policy and Municipal Courts have no jurisdiction in respect of an Act of State which is not done under colour of any municipal law--the prerogative has got nothing to do with State necessity. The Courts have the power to determine whether any prerogative exists and ministers are responsible to Parliament for the proper exercise of the prerogative powers. The King's prerogative again, does not authorise anybody to commit an unlawful act against a British subject. But an alien who is injured by an Act of State has no remedy from a Court of justice but must seek redress by diplomatic representation.

Q. 43. Enumerate the constitutional checks on the exercise of the prerogative of the Executive in England.

Ans. Constitutional checks on the exercise of the Prerogative of the Executive in England : The principal constitutional safeguards against an undue exercise of the prerogative are enumerated by Ridges as follows--

(1) **The Court :** The Ministers and public officials must have recourse to the ordinary legal tribunals to enforce obedience to their commands whenever there has been any violation thereof and in so doing the plea of the King's command or of State necessity would be of no help, whilst the existence of any alleged prerogative may be inquired into then and there.

(2) **Ministerial responsibility :** The Ministers may be punished by Parliament for improper advice given by them to the Crown, either individually or collectively, by loss of office, censure or impeachment.

(3) **Rule of Law :** It is a rule of law that the law will take no notice of the will of the King unless that is expressed in a certain form countersigned by a Minister. The Minister

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whose signature appears on the document is responsible in law for any illegality which may result therefrom and he cannot plead the royal command in his defence to any civil or criminal prosecution that may be brought against him in respect of such illegality. The rule is that all servants of the Crown are responsible in their personal capacity for illegal acts committed by them in public capacity.

(4) **The Sovereignty of Parliament** : The necessity for obtaining supplies and for passing the various annual Acts obliges the Crown to summon Parliament regularly and to observe the laws of the Constitution. Finally, as stated above, Parliament may curtail or altogether abolish a prerogative by statute.

Q. 44. Explain the following:-

(1) The King can do no wrong. (2) The King never dies.

(3) The King is fountain of justice.

Ans. (1) The King can do no wrong : The statement means that the King of England cannot be held responsible for anything done in his name. The reason is obvious. No order of the King is effective unless and until the same has been countersigned by some Minister. The Minister, who countersigns the order of the King becomes responsible for the same.

The King can do no wrong because he can authorise no wrong. The King is not the real executive and has no power to authorise anything. It is the Ministers who have real powers and authority and they alone are held responsible.

The maxim also means that the prerogative of the Crown extends not to any injury, because being created for the benefit of the subject, it cannot be exercised to their prejudice. No one can plead the royal order in justification of the wrongful act.

It is due to the growth of ministerial responsibility that the King has been taken away from the field of party politics. That has added to the popularity of the King. The credit of the discredit goes to the Ministry in power and not to King.

(2) The King never dies : The King has the attribute of immorality. As soon as one King dies, he is succeeded by another. There is no interval. The sovereign always exists and it is only the person who changes. In the words of Blackstone. "Henry, Edward, and George may die, but King survives them all". In other words the Crown is regarded as a Corporation sole.

The maxim does not however apply, so far as the liabilities are concerned. The common law maxim *actio personalis moritur cum personal* (personal action dies with the death of a person) holds good

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against the King. A sovereign is not responsible to refund the money paid to the Treasury by mistake in the reign of his predecessor.

(3) The King is the fountain of justice : The maxim is the origin of the judicial prerogatives of the Crown. The King is the fountain of justice and the general conservator of the peace of Kingdom. The maxim does not mean that the King is the originator but only the distributor of justice. He is the steward of the public to dispense justice to whom it is due. In this capacity the King has the right to setting up the Courts of justice. Criminal proceedings run in the name of the King. The King has also the prerogative of granting pardon after conviction. But this power is exercised by the Crown on the advice of Home Secretary. It may, however, be noted that no pardon can be pleaded by way of defence to an impeachment. The King may excuse penalties resulting from the impeachment. The effect of a pardon is to blot out the offence and to reinstate the person pardoned in his former position.

Q. 45. Has the subject any remedy against the Crown or Government servants for breach of contract?

Ans. Remedy against the Crown or Government servants for the breach of contract : No legal remedy lies as a matter of right against the Crown for breach of contract. (A regular suit cannot lie, for, "the King can do no wrong.") But a petition of right lies as a matter of grace. As the Crown cannot be sued directly, the property of the Crown cannot be indirectly reached by suit against a servant of the Crown in his official capacity. Nor is a public official who has made a contract on behalf of the Crown, personally responsible for breach of such contract. The only remedy is a petition of right to the Crown.

Q. 46. What do you understand by the Petition of Rights?

Ans. Petition of Rights : It is a fundamental rule of English Law that no action can be brought against the Crown. The rule is based upon the wider principle that the King cannot, against his will, be made to submit by the jurisdiction of the King's Court. There would obviously be serious injustice if there was no way of making the Crown, acting through the various Departments of State, liable in any circumstances, more particularly in the case of those Departments which are brought into contact with the trading community. To remove this injustice a remedy has been provided by way of a petition of right to the Crown. A petition of right lay as a matter of grace. It is governed by a statute called Petition of Right Act, 1860. A petition can be brought by the subject both for breach of contract and to recover property which is in the hands of the Crown. It also extends to the recovery of statutory compensation for the occupation by the Crown of private premises and probably for the enforcement to any obligation which is not tainted with tortious liability. The petition is always granted as a matter of course unless it is frivolous or does not

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disclose any cause of action at all. If the Petition of Right is refused, there is no appeal against such refusal. A judgment in favour of a petitioner on a petition of right is in the form of a declaration of the rights of the petitioner and is as effective as a judgment in an ordinary action.

The petition of right does not lie in the following cases:--

(*i*) Where a remedy is provided by statute;

(*ii*) Against any Act of State;

(*iii*) For torts.

After the passing of Crown Proceedings Act, 1947, a regular suit lies against the Crown for tortious acts.

The procedure on a petition of right is regulated by the Petition of Rights Act, 1860. A petitioner has to present his petition to the Home Secretary for submission to the King. The fiat of the King that 'right be done is granted on the advice of the Home Secretary, who takes the opinion of the Attorney-General. This opinion in practice determines the question whether or not the petition is to proceed to trial.

Q. 47. How does the Cabinet under the English Constitution differ from the Privy Council?

Ans. Difference between Cabinet and Privy Council : Though the British Government is really conducted by the Cabinet, which makes all important decisions and directs the administrative and executive activities of the State, yet the Cabinet such as has no existence in law. Its composition, power and functions are defined by no statute or other law. Though responsible to Parliament for all acts of the Government for purposes of the law it has no existence. Thus it can issue no order on behalf of the King which will be recognised by law Courts or have any legal effect. The King, in the eyes of the law, acts only through his Privy Council.

The early Kings were the head of the State and repository of all power, executive, legislative or judicial. Important personage of the realm, however, met and advised the King on matter of State. The Privy Council emerged in the time of Henry VI as an advisory body and at first was an inner circle for private discussions and advice. The King then began to exercise the functions of the State through the Council, so that it became a repository to executive power. It also exercised highest judicial junctions under the King's prerogative to administer justice. With the ablution of prerogative Courts like the Court of Star Chamber, the powers of Privy Council as a Court were markedly decreased.

Though formerly the Council was supreme executive power, in practice thin part of its function has been taken up by the Cabinet. It has also ceased to be an advisory council of the King and it now

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